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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 84.

THE BALTIMORE & POTOMAC RAILROAD COMPANY AND JOHN CASSELS, PLAINTIFFS IN ERROR,

vs.

FRANKLIN H. MACKEY, ADMINISTRATOR OF THE ESTATE OF ROBERT A. BROWN.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 5, 1891.

(14,474.)

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1 *Declaration, &c.*

Filed July 7, 1887.

In the Supreme Court of the District of Columbia.

FRANKLIN H. MACKEY, Administrator,
vs.
THE BALTIMORE AND POTOMAC RAILROAD CO. } Law. No. 27931.

The plaintiff, Franklin H. Mackey, as administrator, duly appointed by the supreme court of the District of Columbia, of the estate of Robert A. Brown, late a resident of said District, sues the defendant, The Baltimore and Potomac Railroad Company, a corporation having an office and doing business in the District of Columbia, for that heretofore, to wit, on the 17th day of March, 1887, within the limits of the District of Columbia, the plaintiff's intestate, the said Robert A. Brown, being then in the employ of the defendant as a car-inspector, was, to wit, on the day and date aforesaid, at work as such employee in the repairing of one — the defendant's cars, and while so at work, by reason of the negligence and default of the defendant, its servants, agents, and employees (which said servants, agents,
2 and employees were not employed by the defendant in the same common work or employment with said intestate, but were employed and were then at work in different departments of duty from said intestate), the said car was run into by another of the defendant's cars, whereby the plaintiff's intestate, by the collision of said cars, was so crushed and injured that death immediately followed, to wit, within the limits of the District of Columbia; and the plaintiff says that the said wrong and injury done to the plaintiff's intestate and the said negligence and default of the defendant, its servants, agents, and employees, were such that if death had not ensued the said intestate would have been entitled to maintain an action and recover damages of the defendant; that the said intestate at the time of his death left surviving him his widow, Margaret Ann, and five children, to wit, four daughters, the eldest about thirteen years of age, and one son about five years of age, and by reason of the premises and the statute in this behalf enacted an action hath accrued to the plaintiff to recover damages for such death aforesaid, to be assessed to the widow and next of kin of the said intestate. Wherefore the plaintiff claims the sum of
3 $10,000.00 as damages for the wrongs and injuries aforesaid, to be assessed as aforesaid, together with costs of suit.

2nd count. The plaintiff, Franklin H. Mackey, as administrator, duly appointed by the supreme court of the District of Columbia, of the estate of Robert A. Brown, late a resident of said District, further sues the defendant, The Baltimore and Potomac Railroad Company, a corporation having an office and doing business in the District of Columbia, for that heretofore, to wit, on the 17th day of March, 1887, within the limits of the District of Colum-

bia, the plaintiff's intestate, the said Robert A. Brown, being then in the employ of the defendant as a car-inspector, was, to wit, on the day and date aforesaid, at work as such employee in the repairing of one of the defendant's cars, and while so at work, by reason of the negligence and default of the defendant, its servants, agents, and employees, the said car was run into by another of the defendant's cars, whereby the plaintiff's intestate, by the collision of the said cars, was so crushed and injured that death immediately followed, to wit, within the limits of the District of Columbia; and the plaintiff says that the said wrong and injury done to the plaintiff's
4 intestate and the said negligence and default of the defendant, its servants, agents, and employees, were such that if death had not ensued the said intestate would have been entitled to maintain an action and recover damages of the defendant; that the said intestate at the time of his death left surviving him his widow, Margaret Ann, and five children, to wit, four daughters, the eldest about thirteen years of age, and one son about five years of age, and by reason of the premises and the statute in this behalf enacted an action hath accrued to the plaintiff to recover damages against the defendant for such death aforesaid, to be assessed to the widow and next of kin of the said intestate. Wherefore the plaintiff claims the sum of $10,000.00 as damages for the wrongs and injuries aforesaid, to be assessed as aforesaid, together with costs of suit.

FRANKLIN H. MACKEY, *P. P.*

The defendant is to plead hereto on or before the first day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

FRANKLIN H. MACKEY, *P. P.*

5 *Summons.*

Issued July 7, 1887.

In the Supreme Court of the District of Columbia, the 7th Day of July, 1887.

FRANKLIN H. MACKEY, Administrator, Plaintiff, *vs.* THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant.	At Law. No. 27931.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court, on the first day of its first special term occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not

have judgment against you for the cause of action stated in his declaration.

Witness E. F. Bingham, chief justice.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

F. H. MACKEY, *Attorney.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

6 *Marshal's Return.*

Served copies of the declaration, notice to plead, and this summons on the defendant, The Baltimore and Potomac Railroad Company, by service on Daniel P. McKeever, ag't said Co., the 7 day of July, 1887.

A. A. WILSON, *Marshal.*

Demurrer to Declaration.

Filed Sep. 6, 1887.

In the Supreme Court of the District of Columbia.

FRANKLIN H. MACKEY, Administrator, &c., *vs.* THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } At Law. No. 27931.

And now comes the said defendant and says that the declaration of said plaintiff is bad in substance.

ENOCH TOTTEN,
Att'y for Def't.

NOTE.—For causes of demurrer defendant says:

1. It appears from the face of said declaration that the al-
7 leged injuries resulted from the negligence of the co-employees of the plaintiff's intestate.

2. The said declaration does not, nor does either count thereof, set forth a cause of action.

3. The first count of said declaration sets forth and is based upon conclusions of law.

Joinder in Demurrer

Filed Sep. 13, 1887.

In the Supreme Court of the District of Columbia.

FRANKLIN H. MACKEY, Adm'r, *vs.* THE BALTIMORE & POTOMAC R. R. CO. } At Law. No. 27931.

The plaintiff says that the declaration is good in substance.

FRANKLIN H. MACKEY,
Att'y for Pl'ff.

Note of Issue.

Filed Sep. 13, 1887.

In the Supreme Court of the District of Columbia.

FRANKLIN H. MACKEY, Adm'r,
vs.
THE BALTIMORE & POTOMAC R. R. } Law. No. 27931.

8 Declaration filed July 7, 1887.
Demurrer filed Sept. 6, 1887.
Att'y for pl'ff, Franklin H. Mackey.
" " def't, Enoch Totten.

The clerk will please place this cause on the law calendar for trial at the next term of the court.

FRANKLIN H. MACKEY,
Att'y for Pl'ff.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the third Monday, it being the seventeenth day, of October, A. D. 1887.

MONDAY, *October 17th*, A. D. 1887.

By order of Walter S. Cox, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of marshal pursuant to rule of court.

9 SATURDAY, *November 12th*, A. D. 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

FRANKLIN H. MACKEY, Adm'r, Pl'ff,
vs.
THE BALTIMORE & POTOMAC R. R. Co., Def't. } At Law. No. 27931.

Upon hearing the defendant's demurrer to the plaintiff's declaration it is considered that said demurrer be, and the same is hereby, overruled, and, on motion, leave is granted the defendant to plead over.

Defendant's Pleas.

Filed Nov. 18, 1887.

In the Supreme Court of the District of Columbia.

FRANKLIN H. MACKEY, Adm'r of Estate of Robert A. Brown, Dec'd.
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } Law. No. 27931.

And now comes the said defendant and for pleas says:

10 1. The said Franklin H. Mackey is not the administrator of the estate of Robert A. Brown, as alleged in said declaration.

2. The defendant is not guilty in manner and form as in and by said declaration alleged.

3. The said four daughters and one son are not and never were next of kin of said Robert A. Brown.

ENOCH TOTTEN,
Att'y for Def't.

Joinder of Issue and Notice of Motion.

Filed Nov. 19, 1887.

In the Supreme Court of the District of Columbia.

FRANKLIN H. MACKEY, Adm'r of Estate of Robert A. Brown, Deceased,
vs.
THE BALTIMORE AND POTOMAC RAILROAD CO. } Law. No. 27931.

The plaintiff joins issue upon the defendant's pleas.

FRANKLIN H. MACKEY, *P. P.*

11 Enoch Totten, Esq., att'y for defendant.

SIR: Take notice that on Tuesday, November 22 inst., at the opening of court, or as soon thereafter as I can be heard, I shall move the court to transfer the above-entitled cause to the trial calendar, as provided by rule ten of the court.

FRANKLIN H. MACKEY, *P. P.*

Nov. 19th, 1887.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a circuit court in and for said District, commencing the fourth Monday, it being the 28th day, of January, A. D. 1889.

MONDAY, *January 28th, A. D.* 1889.

By order of Chief Justice Edward F. Bingham, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

12 TUESDAY, *May 7th, A. D.* 1889.

Session resumed pursuant to adjournment, Justice Montgomery presiding.

* * * * * * *

FRANKLIN H. MACKEY, Adm'r of Robert A. Brown, Pl'ff,
vs.
THE BALTIMORE & POTOMAC R. R. Co., Def't. } At Law. No. 27931.

Now comes here as well the plaintiff, by his attorney, Mr. Mackey, as the defendant, by its attorney, Mr. Totten, and a jury of good and lawful men of this District, to wit, John Stewart, Horace K. Viele, William Muirhead, Albert K. Williams, Stephen Y. Minor, David

Rittenhouse, James O. Hagan, Samuel H. Walker, William C. Hill, Horace Jarboe, Joseph Geier, and Webster Vincent, who, being duly sworn to try the issue above joined, are respited until the meeting of the court tomorrow morning.

WEDNESDAY, *May 8th, A. D.* 1889.

Session resumed pursuant to adjournment, Justice Montgomery presiding.

13

FRANKLIN H. MACKEY, Adm'r of Robert A. Brown, Pl'tiff.
vs.
THE BALTIMORE & POTOMAC R. R. Co., Def't. } At Law. No. 27931.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find said issue in favor of the plaintiff and assess his damages by reason of the premises at the sum of eight thousand dollars, besides costs. Therefore it is considered that the plaintiff recover against said defendant eight thousand dollars for his damages in manner and form as aforesaid assessed, and 8— for his costs of suit, and have execution thereof.

Motion for a New Trial.

Filed May 9, 1889.

In the Supreme Court of the District of Columbia.

FRANKLIN H. MACKEY, Adm'r, &c.,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } At Law. No. 27931.

14 And now comes the said defendant and moves the court to set aside the verdict and judgment herein and to grant a new trial. This motion is based on bill of exceptions to be settled.

ENOCH TOTTEN,
Att'y for Def't.

Undertaking for Appeal to General Term.

Filed May 11, 1889.

In the Supreme Court of the District of Columbia, the 10 Day of May, 1889.

FRANKLIN H. MACKEY, Adm'r, &c., Plaintiff,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY, Defendant. } No. 27931.

The said defendant having appealed to the general term from the judgment pronounced herein on the — day of May, 1889, in the

circuit court (div. No. 2), and John Cassels, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by,
15 perform, and pay its judgment, which they agree may be pronounced against all of them.

THE BALTIMORE & POTOMAC RAILROAD COMPANY,
(By ENOCH TOTTEN,
Att'y-in-Fact), *Appellant.*
JOHN CASSELS, *Surety.*

This is satisfactory.

FRANKLIN H. MACKEY, *P. P.*

May 11th, 1889.

Approved May 11, 1889.

M. V. MONTGOMERY, *Justice.*

Court Proceedings.

SATURDAY, *June 1st*, 1889.

Session resumed pursuant to adjournment, Justice Montgomery presiding.

* * * * * * *

FRANKLIN H. MACKEY, Adm'r, Pl'ff.
vs.
THE BALTIMORE & POTOMAC R. R. Co., Def't. } At Law. No. 27931.

And now again comes here the defendant, by its attorney,
16 and tenders to the court here its bills of exceptions to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record, now for then, which is done accordingly.

17 In the Supreme Court of the District of Columbia.

MACKEY, Administrator,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY. } At Law. No. 29931.

Filed June 1, 1889.

Bill of Exceptions.

Be it remembered that the above-entitled cause came on for trial on the 7th day of May, 1889, before Mr. Chief Justice Bingham and a jury, and thereupon the plaintiff, to maintain the issues on his part joined, offered in evidence a certified copy of letters of administration issued to him out of the probate court of the District of Columbia as administrator of Robert A. Brown, deceased.

18 And thereupon the defendant, by its counsel, objected to the introduction of said letters of administration in evidence; but the court overruled said objection and allowed the said certified copy of letters of administration to be admitted in evidence and to be read to the jury, to which ruling of the court in so admitting the said letters of administration and allowing the same to be given to the jury the defendant, by its counsel, then and there duly excepted, and said exception was noted at the time upon the minutes of the court, and counsel for the defendant prays the court to sign and seal this his first bill of exceptions, which is accordingly done, now for then, this 1st day of June, A. D. 1889.

M. V. MONTGOMERY, *Justice*. [SEAL.]

And thereupon, and upon the evidence contained in the first bill of exceptions, which is made a part hereof, the plaintiff, to maintain the issues on his part joined, produced as a witness Mrs. ROBERT A. BROWN, who, being first duly sworn, testified that she was the widow of Robert A. Brown, deceased, the plaintiff's intestate; that said Robert A. Brown met his death by an accident which occurred in the Jersey yard, while in the employ of the Baltimore & Potomac Railroad Company; that at the time of his death they had five children living, the oldest of which is fifteen years of age and the youngest was seven years of age; that they were all girls but one; that the youngest child, aged five years, was a boy; that at the time of his death her husband, Robert A. Brown, was employed by the defendant, The Baltimore & Potomac Railroad Company, as a car-inspector.

And thereupon the plaintiff, to further maintain the issues on his part joined, gave evidence to the jury tending to show that the decedent, Robert A. Brown, was a car-inspector employed by the defendant, The Baltimore & Potomac Railroad Company,

19 and had been in such employ for about five years; that on the night of the 17th of March, 1887, he was on duty in the Jersey yard, a freight yard of the defendant company, in the discharge of his regular duties as car-inspector, same as always; that on the said night of the 17th of March, 1887, the said Robert A. Brown was at work in the Jersey-avenue freight yard, in company with witness, who was his uncle, who was also employed as a car-inspector by the said defendant company; that the fast-freight train came in from Baltimore, and upon examination of the train they found a defective draw-head, or, as it is called amongst railroad men, a "bull-nose;" that the cars were all coupled together, and it was impossible to repair the said defective draw-head without the assistance of the yardmen; that thereupon the said Robert A. Brown, deceased, requested the yardmen to cut the train so that the defective draw-head could be repaired; that they asked Conductor Phillips, who was the conductor in charge of the shifting engine, employed at that yard, to cut the train, and told him that if he would give them from five to seven minutes they would repair the car for them, and that if it was not repaired it would be pulled all to pieces;

that thereupon the conductor ordered one of the brakeman, with the yard engine, Hillary, to cut the train, and give them a chance to fix it; that Conductor Phillips turned his back then, and walked towards the office which was across and about twenty yards distant from where the defective car was; that said Conductor Phillips "shut the engineer off;" that Robert A. Brown and witness went in there to work at once; that Robert A. Brown took the draw-head out and repaired it, and that just as William Brown was about to drop the key in, which holds it together, he felt the cars going away from him; that witness thereupon immediately came out from under the car and looked up and saw Robert A. Brown, deceased, crushed in between the cars; that they were working on the fifth car from the tender, and that the cut was between the fourth and fifth cars; that when
20 the cars were cut they were pulled forward about eight or ten feet; that the trainmen never notified them or gave them any hint of what they were going to do; that no bell was rung and no whistle blown, and that the conductor never notified them that he was going to cut the engine loose after they asked him to cut the train and let them go to work; that at the head of the train was the engine, then came the tender, then a stock car, then a coal-oil tank, and then two coal cars; that said coal cars were very heavily loaded; that the grade is from South Capitol street to Jersey avenue and it is a very steep grade; that the engine was at the higher end of the grade; that the accident occurred between 10:30 and 11 o'clock at night; that when the crash came Robert A. Brown had his back towards the car that ran against him, and was facing his work; that after the accident witness came out from the cars and gave the signal to them to go ahead, and that he got a reply that they could not go ahead as they were not coupled up; that the engine then came back again against the cars and knocked them about a foot, while Robert A. Brown was still fastened between the cars; that from the time Conductor Phillips cut the train loose to permit them to repair it, he was not seen by witness until after the accident; that the engine was a Baltimore & Potomac engine, and that it was a regular shifting engine which is generally used to move cars about in the freight yard, and is somewhat different in style from a road engine; that a full crew with a shifting engine in a yard is six men, consisting of an engineer, a fireman, a conductor and three brakemen; that on the night of the accident there were only two brakemen on the train, and that to man such an engine as they had on that night, six men would be necessary—an engineer, a fireman, a conductor and three brakemen.

And thereupon, on cross-examination by counsel for the defendant, the said witness, William Brown, testified that the
21 deceased, Robert A. Brown, was his nephew; that he (William Brown) had been employed as a car-inspector for about three years, and that it was the business of car-inspectors to examine the cars and see that they were in good order, and if they were not, to put them in good order.

And thereupon the counsel for the defendant, on cross-examina-

tion propounded to the said witness, William Brown, the following questions, to which answers were given, respectively, as follows:

"Q. What kind of weather was it on that night?
A. It was a fearful bad night.
Q. Was it snowing or raining?
A. Snowing.
Q. Was the wind blowing any?
A. It was blowing very hard.
Q. When you went under this car did you hang out your blue light?
A. No, sir; we did not.
Q. That was your duty, was it not?
A. We have blue lights there and blue flags there.
Q. You did?
A. Yes, sir.
Q. Why didn't you put them up?
A. We didn't put them up. There was nary one of them filled.
Q. You had not filled your lamps?
A. We had not filled them.
Q. It is your duty before going under a car to put up a blue flag in the daytime and a blue light at night?
A. Exactly.
Q. And you did not do it at that time?
A. We did not do it at that time.
Q. What time in the night was this? You said that once, but I did not catch it.
A. It was about 10:25 or 10:30.
Q. Then it was dark?
A. Yes, sir.
Q. A dark night?
A. Yes, sir.
Q. Were there any other engines around there shifting or doing anything at that time?
A. The fast-freight engines were at the lower end of the yard.
Q. That is farther to the east than the other engine?
A. Farther to the west.
Q. Was this switching engine west of this car? I mean the one which you tried to repair.
A. No, sir; that was east.
Q. That was east of you?
A. Yes, sir.
Q. And the other engine was west of you?
A. Yes, sir.
Q. Were there any other cars around there?
A. Yes, sir; on the other side of us.
Q. All around you?
A. Yes, sir.
Q. There were five hundred cars around there?
A. Well, I could not say that.
Q. Well, there was one hundred, was there not?
A. I guess so."

And thereupon the said witness, William Brown, further testified, on cross-examination, that the deceased, Robert A. Brown, had his back towards the cars which the shifting engine had hold of; that both of them told the conductor to cut loose the car; that it was not more than a half a minute after the cars were cut loose before they went in there to go to work, and that just as soon as the engineer stopped they went in and commenced work.

And thereupon the counsel for the defendant propounded to the said witness the following questions, to which answers were given, respectively, as follows:

"Q. Your business is to repair cars?

A. That is what I have been following.

23 Q. In the first place, your business is to ascertain whether the cars which come into your yard need repairs?

A. Yes, sir.

Q. And that was his business?

A. Yes, sir.

Q. When you found a car that needed repairs you were to repair it, or have it taken out of the train and sent to the repair shop?

A. Exactly.

Q. You have been engaged in that business for three years inside of the yard?

A. Yes, sir.

Q. How long had Robert A. Brown been engaged there?

A. About the same time.

The COURT:

Q. In the same employment?

Mr. TOTTEN: Yes, sir.

By Mr. TOTTEN:

Q. Robert was your superior, was he not?

A. Yes, sir."

And thereupon the plaintiff, to further maintain the issue on his part joined, produced as a witness one WILLIAM B. TEILING, who being first duly sworn, testified that in March, 1887, he was in the employ of the Baltimore & Potomac Railroad Company on the shifting engine; that he was engaged as a brakeman with that engine at the time the accident occurred.

And thereupon the said witness, in response to interrogatories propounded to him by counsel for the plaintiff, testified as follows:

"Q. Now, just state how you came to cut the cars loose and all about it, to the court and jury.

A. The conductor came to me and the conductor and I went up towards the engine after these cars had been cut loose. The

24 engineer told the conductor he wanted water or something. The conductor asked him if he would go up to the end of the yard and bring down a stock car. He said he could. The conductor told me to get up on the end brake and put it down, and to

cut loose the car. I got up and put down the brake on the stock car and gave the signal for the slack and pulled the pin.

Q. You got up and put this brake down on which car?

A. On the stock car, the end brake.

Q. The end brake on the car next to the tender?

A. Yes, sir; the car that was next to the tank.

Q. And the brake next to the tank also, was it not?

A. Yes, sir.

Q. You got up and put down that brake?

A. I put it down.

Q. Did you pull it?

A. Yes, sir.

Q. You pulled it as tight as you could?

A. Yes, sir.

Q. After you pulled it as tight as you could, what then?

A. Then I stepped on to the tank and gave the signal for the slack and pulled the pin.

Q. To whom did you give the signal?

A. To the engineer.

Q. Then what was done?

A. He gave me the slack and I pulled the pin.

Q. When he gave you the slack did the engine hit the car or not?

A. He came back lightly.

Q. You just gave him the signal for the slack and he came back?

A. Yes, sir; he touched lightly when he came back and I pulled the pin.

Q. Then what resulted from that?

A. Well, the cars ran down.

Q. Did they run down of their own momentum or did they run down because they were hit?

A. I don't know; I suppose—I don't know anything about that. The cars started down the grade. They didn't start because he came back against them, because he didn't hit them hard enough to send them. He just hit them lightly.

Q. They started down of their own momentum?

A. Yes, sir.

Q. How is this grade?

A. It is a pretty steep grade.

Q. All that you know is that they started down the grade?

A. Yes, sir."

And thereupon the said witness further testified that after he pulled the pin both the witness and Hillary, the other brakeman, started to run down the track and "hollered" to these men to get out from underneath there; that he, witness, did not know they were there until Hillary told him they were there and not to pull the pin; that Bill Brown was the only man that he saw get out from under the cars; that there were three or four cars between the tender and the car with the defective draw-head; that Conductor

Phillips was standing on the ground near the tender and watched him while he set the brakes.

And thereupon in response to interrogatories propounded by counsel for the plaintiff the said witness testified as follows:

"Q. Do you know whether one brake was sufficient to hold these four cars or not on that night, standing where they did stand?

A. Do you mean me to answer the question whether one brake will hold four cars?

Q. Standing where those cars did stand on that night, and on that grade. You have said that it was a steep grade?.

A. Yes, sir.

Q. I asked you whether one brake was sufficient to hold those four cars?

A. I have held four cars with one brake.

26 Q. If the brake had been in good order would that brake have held those four cars?

A. A good brake will hold four cars; yes, sir.

Q. On that grade?

A. Yes, sir."

And thereupon, on cross-examination by counsel for the defendant, the witness, William B. Teiling, further testified that the engineer came back gently, and gave him the slack; that he did not disturb the cars but just touched them lightly, and then witness pulled the pin.

The said witness thereupon, on cross-examination by counsel for the defendant, testified as follows:

"Q. You got up and set this brake on the car near the engine?

A. Yes, sir.

Q. Did you set it well?

A. Yes, sir; I swung on it as hard as I could and put my foot up against it.

Q. How is that brake-wheel fixed; where was it?

A. You know there, on the end of the car. It is on the end of the car. It is a brake that you turn around this way (indicating). You stand on the wood here (indicating), and there is a chain that runs up and down to it.

Q. You tightened it up?

A. I tied it as tight as I could.

Q. How many times did you jerk it?

A. I don't know how many times I jerked it. I jerked it as tight as I could.

Q. You set the brake as tight as you could?

A. I set that brake as tight as I could.

Q. And it evidently took hold, did it?

A. I thought it was a good brake; yes, sir."

And thereupon the said witness, William B. Teiling, further testified on cross-examination that Bob Smith was the engineer

27 in charge of the shifting engine, and Mr. Phillips was the conductor in charge of this business; that Johnny Harmon

was the fireman, and the other brakeman who was working with him was named Hillary; that when the cars were cut to let Robert A. Brown and William Brown repair the car Hillary pulled the pin; that after they cut loose from the broken car the engine pulled the cars about one and a half times the length of a car; that the wind was blowing very hard, and it was snowing; that when the cars were disconnected from the broken car he heard somebody say: "That will do," and he thereupon gave the signal to the engineer to stop; that the accident occurred between 10 and 11 o'clock, and that it was dark; that he did not know there was anybody under the car.

And thereupon the said witness, on cross-examination by defendant's counsel, and in response to interrogatories propounded to him, testified as follows:

"Q. Did you see any blue light anywhere around there?
A. No, sir.
Q. Were there any engines about there?
A. No. 326 was over on the other side, I think, sir."

Thereupon, on redirect examination by counsel for the plaintiff, the witness testified that at the time of the accident there were only two brakemen, but that when they started out in the morning there were three brakemen; that the other brakeman's name was Bob Bowles.

And thereupon plaintiff, to further maintain the issues on his part joined, produced as a witness one WILLIAM WHITE, who, having been first duly sworn, testified that in March, 1887, he was a car-inspector in the employ of the Baltimore & Potomac Railroad
28 Company; that Robert A. Brown, the deceased, was the chief car-inspector in the Jersey yard; that he was acquainted with a man named Downs, who was supposed to be the chief car-inspector; that on the next day after the accident, or on the evening of the next day after the accident, the witness went, in company with Mr. Downs, to examine this car with the defective brake; that he was not positive whether it was on the day after the accident or the second day after the accident that they went to examine the said car with the defective brake; that he went with Downs to assist him to find the car; that they found it and made an examination of the brake, and that the result of the examination was that they found the brake was a defective one; that the car was marked "defective brake" on the end of the car; that the witness (William White) got up on top of the car and tried both the top and the end brake; that he first put the brake down, and then came down and examined it, and found that the bottom connection was too short, and that "if it had been a long connection, or connected all along, it would have been a pretty sufficient brake;" that this car was brought up from the Jersey yard during the night, or in the morning, along with a draft of eighteen or twenty or twenty-five other cars; that he did not know whether this car with the defective brake was hauled by another engine or was shifted back-

wards and forwards after the time of the accident or not; that the car was still loaded with oil; that chalk marks "defective brake" were on the car when it got into the Maryland-avenue yard; that he did not know how the car got there; that he went with Mr. Downs to examine this car about half past six or seven o'clock in the evening; that he examined the car with the defective draw-head shortly after the accident; that he saw the tools lying around there which were used for the purposes of fixing cars, and that he examined the draw-head and saw what it needed; that he told the men to look out for him, and he got under the car and did the work; that it took him about three minutes.

29 On cross-examination by counsel for the defendant, the said witness, William White, testified that the three minutes required to do the work included the time to get under the car and get out; that it probably took him about two minutes to do the repairing; that if everything worked favorably he could do it within less time; that he did not know that the brake which he examined was the brake on the car connected with the accident, except that he was told that that car was the cause of the accident; that he did not know it as a fact; that Robert A. Brown was his superior officer—"our leader"—or foreman in the yard; that he, witness, first discovered the chalk mark "defective brake" when he went to examine the car; that it was marked on the end of the car, and on both sides; that he could not say in whose handwriting the chalk marks were; that the car, when he discovered it, was standing on No. 3 track, near the corner of 9th street and Maryland avenue, on the south side of the street; that it was standing there, with other cars, coupled up, and that the said car was not a car of the Baltimore & Potomac Railroad Company, but was a Pennsylvania Railroad car.

And thereupon the witness, on cross-examination, further testified in response to interrogatories propounded to him by counsel for the defendant, as follows:

"Q. Did you not say that chalk marks were there when it first came into the yard?

A. It was there, sir, on that car, because I had heard it was. I heard it was on the car when it was in the Jersey yard.

Q. You must not tell us what you have heard here. That is not what we want to know about. We want to know about what you know. Do you know when that chalk mark was put on there?

A. I do not, sir.

30 Q. Do you know whether it was put on there while the car was in your yard or before it came there?

A. I could not say that.

Q. You know you did not mark it?

A. No, sir.

Q. It may have been there two days, for all you know?

A. Yes, sir.

Q. Whose duty is it to put those marks on?

A. Well, the duty comes under this head. There are cars that come into our yard which are out of repair, and there are cars that

come in there from other companies. Our company don't hold us responsible for fixing those cars, because we don't get paid for it. We are instructed not to use our materials unless it was for a broken draw-head, and then we would have to put in another draw-head. Sometimes we do work and card it to go to other companies. There are a great many cars come in that way, marked 'defective brake.'

Q. Who marks these cars 'bad brake' with chalk?

A. Well, it was the car-inspector's place.

Q. You found this brake out of order?

A. Yes, sir.

Q. When you find a brake is out of order you take a piece of chalk and write on the side of the car?

A. I would if I did not fix the car there.

Q. If you did not fix it there and then, you would write on the side of the car with chalk?

A. Yes, sir."

Thereupon, on redirect examination by counsel for the plaintiff, the said witness, Wm. White, testified that the chalk marks upon the car looked pretty pale, like they had been on there for some time; that when a car had a defect it would take two or three minutes to repair, and that car was a part of a train, but was momentarily uncoupled in order to allow the inspector to go in and make the repair, there was a verbal rule given to car-inspec-
31 tors in regard to placing a blue light upon the car; that "the rule is when we are repairing in a train or out of one—when out of a train or with an engine attached to the end of the train we are not supposed to use a blue light; but when we are repairing a car on any track when there is not an engine attached to it we are supposed to put a blue light on the head car to the one we are repairing simply. If that is the only car then we are supposed to put it on that; but if there are cars above it we are supposed to place it on the end car. Then the roadmen would say that there were car-inspectors there and not to touch or move those cars until that light is removed, but we are not allowed to put a light there when an engine is attached to the end on that same track."

"Q. You put a blue light on both ends, don't you?

A. We do; yes, sir.

Q. Suppose there were four or five cars and you were repairing the middle one, you would put a blue light on both ends?

A. We are supposed to do it; yes, sir. But when an engine is attached we are not supposed to put a light up?"

It was thereupon admitted by counsel for the defendant, that the deceased, Robert A. Brown, was 34 years of age at the time of his death; that he was a man in sound health and received $45 per month.

And thereupon counsel for the plaintiff announced his testimony closed.

And thereupon the testimony for the plaintiff having been closed and given to the jury, defendant's counsel moved the court to instruct the jury upon the evidence so given and set forth in this and the first bill of exceptions, made a part of this, to return a verdict for the defendant; but the court overruled the said motion and refused so to instruct the jury to return a verdict for the
32 defendant, to which ruling of the court in overruling the said motion for a verdict upon the whole evidence so given by the plaintiff, the defendant, by its counsel, there and then duly excepted, and the exception was noted at the time upon the minutes of the court, and counsel for the defendant prays the court to sign and seal this his second bill of exceptions, which is accordingly done, now for then, this 1st day of June, A. D. 1889.

M. V. MONTGOMERY, *Justice*. [SEAL.]

And thereupon the defendant, to maintain the issues on its part joined, gave evidence to the jury tending to show that R. M. Smith was an engineer in the employ of the Baltimore and Potomac Railroad Company and was in charge of the shifting engine upon the night of the 17th of March, 1887, when the accident occurred; that he had been running an engine for five years; that on the night of the accident he was engaged in shifting cars; that he went to work on that day about seven o'clock in the morning; that he got down into the Jersey yard with his engine a little after ten o'clock on the night of the accident; that the train which contained the car with the defective draw-head was an extra train on the Baltimore and Potomac railroad, but that it was a scheduled train to leave Washington for the south, at 8.45, and on this night it was late in getting in; that the crew with the shifting engine was composed of himself as engineer, Mr. Phillips, the conductor; Mr. Teiling and Mr. Hillary, the brakemen, and Johnny Harmon the fireman on the engine with the engineer; that the first thing they did after getting into the Jersey yard on that night was to shift the southern cars; that is, cars which had been brought down from the upper freight yard and were going south; that they commenced to shift the southern cars as soon as they arrived in the yard, which occupied about 20 or 25 minutes.

33 And thereupon the witness, R. M. SMITH, testified in response to interrogatories propounded to him by the counsel for the defendant, as follows:

"Then I backed up against that train and I told the conductor when I backed up against it that my water was very scarce in the tank and I did not think I could shift the train, but I would do what I could. I shifted one cut of the train and went back again; I got the signal to go ahead, I went ahead a little way, probably a car-length, and then they stopped me. They gave me another signal to stop. I had no water. The water was all gone and I could not do any more work. He came up and got on the step of the engine and asked me if I could take a car-load of stock up and

said that we would stop at 6th street and get water. I told him I could do that.

Q. A car-load of stock?

A. Yes, sir.

Q. That had no reference to these cars?

A. No, sir."

And thereupon the defendant, by its counsel, to further maintain the issues on *his* part joined, gave evidence to the jury, tending to show that the train containing the car with the defective draw-head was placed by the engine bringing it in from Baltimore upon No. 1 track in the Jersey-avenue yard; that it was a full train, containing about twenty-five freight cars; that the number of cars in one cut in shifting cars depends upon the conductor, who knows where the cars are to go and who cuts off as many as are to his advantage; that in the first cut from this train they carried off about eleven cars and put them on the different tracks in the yard; that there are eight tracks in the Jersey-avenue yard, and that the yard itself will hold from 150 to 175 cars; and that there were a great many cars around the yard at the time of the accident; that this train containing the car with the defective draw-head was called "the fast freight."

34 And thereupen the said witness, R. M. Smith, in response to interrogatories propounded by counsel for the defendant, testified as follows:

"Q. Was there any other engine about there working on that night?

A. The Alexandria and Fredericksburg engine was at the lower end of the yard. I think it was either 53 or 54 that worked there.

Q. You mean that was the number of the engine?

A. Yes, sir; at the lower end of the yard.

Q. That is towards Baltimore.

A. No, sir; towards Four-and-a-half street, reaching from there to South Capitol street.

Q. That engine was working down in that direction?

A. Yes, sir.

Q. What was it doing?

A. I couldn't say exactly; but I think they had taken out the Richmond cars out of this train."

And the said witness, R. M. Smith, further testified that when he cut the said train in order to allow the inspector to repair the draw-head he pulled away three or four cars and he is not positive which, but that he thinks it was four; that he pulled them off about a car's length; that the freight cars would average about 37 feet in length from bull-nose to bull-nose.

The said witness, R. M. Smith, thereupon, in response to interrogatories propounded to him by counsel for the defendant, testified as follows:

"Q. You pulled them about the length of the car. Then what did you do?

A. I stopped, and, as I told you, Mr. Phillips came up and I told him I could not do any more work without water. He asked me if I could take a car-load of stock up and said that we would stop at Sixth street and take water as we went up. I told him I thought I could. Then Mr. Phillips and Mr. Teiling, both of them, gave me the signal for the slack. I gave them the slack very gently. I just let off the air. I did not reverse the engine at all. They took the slack and when he pulled the pin Hillary hollered to Teiling not to pull the pin, but the cars were cut then. He had pulled the pin. Hillary ran down there and hollered and Mr. Phillips ran and hollered, and I think Teiling ran too and hollered, "Look out!" I hollered and rang the bell, and I really didn't know what I was hollering for. I was hollering because the others were, because I did not know that there was anybody working on any of the cars.

Q. Did you see anybody set the brake next to you?

A. I saw a man set the brakes on the stock car.

Q. Who was it?

A. Teiling.

Q. Did you see him actually set it?

A. Yes, sir; I saw him actually set it.

Q. How did he do it?

A. He put it down as hard as he could with his hands, and then he put his foot up against the side of the car, and pulled on it with his whole weight. You may say he swung his whole weight on the brake.

Q. When on the engine can you feel the effects of setting your brake?

A. Yes, sir.

Q. Did you feel it that night at that time?

A. No; I was standing still then.

Q. You can feel it only when you are in motion?

A. Yes, sir.

Q. Did you notice anything peculiar about the brake?

A. No, sir; I did not. I noticed that the man was putting it down tight; that is all."

And thereupon the said witness further testified that when the pin was pulled the car started back and came into collision with the standing car; the brakeman, Hillary, then came up to him and told him that the car had gone down and caught Brown, and for him to come and pull them away from him, which he did.

The said witness, R. M. Smith, thereupon testified in response to interrogatories by counsel for the defendants, as follows:

"Q. It was testified here yesterday that you jarred your engine back against these cars; is that true?

A. No, sir; that is not true. I did not jar the engine back against the car.

Q. In what way did you approach the car in fastening on to it?

A. As carefully as I possibly could, because I had been told there was a man between the cars and I supposed I was going to touch him as lightly as I could, knowing that he was between them.

Q. How lightly can you couple a car?

A. I can couple up to a car without touching the bull-nose at all to my tender, provided that the link is all right. If the link is that long (indicating) I could couple up to it without touching the bull-nose.

Q. As a matter of fact, when you coupled up to those cars to pull them away, did you come back gently or hard?

A. I do not think I touched the bull-nose.

Q. Then what did you do?

A. I pulled the cars away.

Q. Who coupled you to the car at that time?

A. Hillary.

Q. You pulled the cars away?

A. Yes, sir.

Q. Did you notice when you pulled the cars whether the brakes were set on any of them?

A. I could not move them when I first started them. I think one of the brakemen let off a brake or two and I know that I started after they let the brake off.

Q. After you had pulled that second car away you say you pulled it away about the length of a car, about 37 feet?

37 A. Yes, sir.

Q. Did you see any indication that anybody was at work under any of the cars or about them?

A. No, sir; I did not.

Q. Did you see any kind of a blue light?

A. I did not.

Q. What is the usual light when a man is working under a car to indicate to engineers that there is such a thing going on?

A. To display a blue light or blue flag. A blue flag in the daytime and a blue light at night.

Q. Was there any blue light about that car?

A. No, sir.

Q. If there had been one could you have seen it on a car that was in a bad condition?

A. I do not know; unless it was hanging out on the side I could not have seen it.

Q. That is the place to hang it, is it not?

A. It is usual to hang it out on the side."

The said witness further testified that on the night of the accident and prior thereto he saw Robert A. Brown at the junction of Jersey avenue and Virginia avenue and spoke to him; that they passed remarks about the weather and about it being such a bad night; that he had a white lantern in his hand and was walking around there; that the deceased, Robert A. Brown, was a personal friend of his and he had known him for about 15 or 16 years; that

he, witness, is now running the same engine that he was running on the night of the accident, being engine No. 327; that the present complement of men composing a crew for a shifting engine is six men—a conductor, an engineer, a fireman and three brakemen; that he could not say whether a change took place before the accident or not, but that at about the time of the accident they only had two brakemen with the shifting engine; that the night of the accident was a very bad one, the wind was blowing very hard; it was dark and there was snow on the ground.

38 And thereupon the defendant, to further maintain the issues on *his* part joined, produced as a witness one ROBERT F. DOWNS, who, being first duly sworn, testified that on the 17th of March, 1887, he was then chief car-inspector for the Baltimore and Potomac Railroad Company, and had been for a number of years; that he is the foreman of both the passenger and freight department or repairs of motive power; that he had under him about six or eight car-inspectors in the freight department in the city of Washington, and about the same number below on the Alexandria and Fredericksburg railway, and that his station or place of business is and was at the Baltimore and Potomac depot, on Sixth street, in this city; that it was his business to see that the cars were kept in repair, but that he did not look after that himself; that he saw to it that the other men under him did it; that he knew Robert A. Brown, the deceased, very well, and that he, Robert A. Brown, had been in the service of the company in the neighborhood of five years or more; that he was the leading car-inspector at night; that they had rules and regulations with respect to the inspection of cars, and that they were printed in a book of rules.

And thereupon counsel for the defendant handed to the witness a certain book containing the rules and regulations regarding the inspection of cars by car-inspectors, and particularly called the attention of the witness to rules Nos. 359, 360, 364, and 365, and also called the attention of the witness to rule 34, upon the back of a printed schedule or time-table, with reference to the inspection of cars.

And thereupon the said witness, Downs, further testified that the rules to which his attention had been called by counsel were general rules, and were in force at the time of the accident, and had always been in force for many years; that rule No. 34

39 upon the back of the schedule was in force at the time of the accident; that it has always been printed on the back of the schedule or time-table, and was a general rule; that the witness employed these car-inspectors, and when they were employed he gave them these rules verbally; that he did not give them the book containing the rules, but he gave the important items of the rules to the car-inspectors; that he gave instructions to Brown verbally, and that he, Brown, understood them fully.

And thereupon the said witness, Downs, in response to interrogatories propounded by counsel for the plaintiff, testified as follows:

"Q. What did you say to him in reference to those rules?

A. I told him under no circumstances was he to go on a car without a blue flag in the daytime or a blue light at night; that that was their protection. I was always very emphatic about that. They understood that just as well as I did. That was their only safeguard.

Q. Will you state about how old Robert A. Brown was? It has been conceded that he was thirty-four years old, about, when he was killed.

A. I think he must have been older than that. That is my impression about it.

Q. I want to know whether he was a man of mature years.

A. Yes, sir.

Q. How was he as to brightness in the performance of his duties?

A. He was bright.

Q. I want to know whether he was a skilled man or not?

A. He was a good man; a good skilled man, and a man I had every confidence in."

The said witness, Downs, further testified that he generally sent a copy of the schedule, on the back of which rule No. 31 was printed, to the office or building where the inspectors were accustomed to go, so they could see what was on that schedule; that said office is down near the junction of Jersey avenue and Virginia avenue, and was the place where car-inspectors kept material such as are needed in the repair of cars; that he was at home on the night of the accident, and did not hear about it until the following morning.

Thereupon the said witness (Downs), in response to interrogatories propounded by counsel for the defendant, testified as follows:

"Q. About the time of this accident were there any oral or verbal instructions given to car-inspectors varying from those printed rules on the subject of blue lights. I am asking now with reference to blue lights on a car in a train attached to an engine. Were there any oral instructions given by you to any car-inspectors?

A. The instructions were at no time to undertake to do anything unless the blue light was up, but there was a modified form of instructions in this direction. When a train arrived here from the south or from the north and had to be shifted I told them that if they could, consistently, not to interfere with the shifting men and not to place a blue light on cars while they were shifting unless they had work to do, but if they had work to do invariably to put up a blue light. I think we accommodate one another in that way. That is, that they were not to go there to do any work whilst they were shifting, unless the blue light was on them. That was to facilitate the shifting of cars, not to put a blue light on them. The idea was this——

The COURT: What is the question?

The WITNESS: I have answered it.

By Mr. TOTTEN:

Q. A blue light was not put on, as I understand it, to interrupt the shifting process?

41 A. No, sir; if there was no work to do. They were not to put a blue light on to hold that train while they passed along and inspected it, but under no circumstances do any work without they put up a blue light. That was always understood by all our car-inspectors.

Q. Will you tell us with reference to your examination of a car some days after this accident with Mr. White. Did you do it?

A. Yes, sir.

Q. Tell us when it was with reference to the accident; whether it was one or two or three days afterwards?

A. I am not clear on that point. It seems to me it was two or three days afterwards, because when I started to hunt that car I did not expect to find it in the yard. I am not certain about the time. It may have been the third day or the second day but one. I started to hunt the car, I remember very well. I got orders to look after that car to see what condition it was in.

Q. And you found the car somewhere?

A. Yes, sir; I found the car.

Q. Do you know what the number of the car was that you found?

A. No, sir; I could not tell you now.

Q. What kind of a car was it?

A. A stock car.

Q. What is a stock car?

A. A car that is boarded up all on the sides.

Q. Like a board fence?

A. Yes, sir.

Q. About six feet high?

A. Yes, sir; about six feet high and I suppose two or three inches between each board.

Q. Where was the car?

A. The car was then on Maryland avenue right opposite the freight-house.

Q. What was on it?

A. There were barrels in there.

Q. Were there any marks on it?

42 A. That I am not positive of now. Whether there were any marks on it or not I could not say. I couldn't say that there was, and I won't say that there was not.

Q. What was the manner of marking cars that were out of order at that time?

A. The manner was to mark the cars 'no brake,' if there was no brake on the car.

Q. How was it marked?

A. We marked that with chalk, 'no brake.'

Q. Was any date put to it?

A. Always, as a general thing. It ought to be that way, and if it was carried out there would be a date on it.

Q. I want to know what the usual manner of doing it was?
A. Well, that is the usual manner.
Q. To indicate what is the matter with the car and the date when it is discovered?
A. Yes, sir.
Q. You don't know as there was any mark on this car?
A. I do not remember of any mark being on that car.
Q. Had you any personal knowledge at that time as to whether that was the car or not?
A. No, sir; only that they gave me the number to look after, and that number I found.
Q. Did they examine the brake?
A. Yes, sir.
Q. What was the condition of it?
A. It was not a number one brake.
Q. What is a number one brake?
A. A number one brake is—it will hold a car.
Q. Do you mean to say that the brakes are numbered?
A. No, sir; I do not mean that.
Q. You mean a first-rate brake?
A. Yes, sir.
Q. It was not a first-rate brake?
A. No, sir.
43 Q. What was the matter with it?
A. Well, the connections did not work as they ought to have worked.
Q. At that time?
A. At the time that I saw it. That was two or three days afterwards. I think it was three days; but I can't tell exactly now.

Mr. TOTTEN: If your honor please, I believe I will read these rules to the jury.
Mr. MACKEY: I object.

By Mr. TOTTEN:

Q. Do you remember whether you read these rules to Mr. Brown?
A. No, sir; I did not read the rules to him from the book.
Q. Did you have a copy of the book?
A. Yes, sir; always.
Q. What did you do with reference to Mr. Brown, touching these rules which I have shown you?
A. As I told you——
Q. Tell the jury what you did with reference to Mr. Brown?
A. I told Mr. Brown that he must have a blue light at night or a blue flag in the daytime before going under any car to repair it, and under no circumstances to do any work on any cars without that protection. That was their protection.
Q. What did you tell him in respect to working on or inspecting cars when they came in? What orders did you give him in reference to that subject?
A. The same orders.

Q. What did you tell him to do when cars came in?

A. Without doing any work to them—the matter of inspection is one thing, and the matter of doing work is another.

Q. I want you to explain to the jury what you instructed Brown with reference to his duties of inspecting cars which came in?

A. I told him to accommodate the shift, if they could, and not to put a blue light——

44 Q. I want to know what you told Mr. Brown in reference to inspecting cars,—for instance, a train of cars is brought in and put on the side track. The engine goes away to its place. Now, there is a train which has just arrived. Was it anybody's business to inspect those cars?

A. Yes, sir.

Q. Whose?

A. It was his, I suppose, at night.

Q. What did you tell him about that when you gave him instructions?

A. I told him in all cases when there were cars that could not be repaired that they should be got out and sent to the shop, and if they could repair them on the track to put a blue light on the track outside to protect themselves.

Q. Won't you go a little further back than that. I have asked you what his duties were in case a train of cars is brought in from Baltimore and put on the side track. There is a train left on the side track. What was his business?

A. To inspect them.

Q. What is inspecting them?

A. Going along to each car and to see that everything is all right on that car. That is what their business was.

Q. What did you tell him about that?

A. That is what I told him when I hired him. That is what he was hired to do.

Q. Did that include an examination of everything about the car?

A. Yes, sir.

Q. What?

A. An examination to see that the brakes were all O K, and to see that everything was in order.

Q. Does that include the wheels?

A. Yes, sir.

Q. And the running gear?

A. Yes, sir; it included everything pertaining to a car.

Q. What is the running gear of a freight car?

45 A. Why, the wheels and truck.

Q. Are these freight cars usually attached to them?

A. At each end.

Q. How was it about this particular car we are talking about, this stock car. Were there two trucks to that?

A. Yes, sir; I think there was two trucks to that. I know the brakes at the east end was the one that was tried.

Q. How is that attached to the car?

A. I think that was attached on the end of the car. Some brakes have a chain to go up to the top of the car.

Q. Was it attached by means of a shaft or by a chain, or both?

A. By a chain and shaft both. I think that is the way that was; but I am not quite positive about that.

Q. Was there any other means of protecting a car-inspector who was at work about a freight train than the blue light, that you told us about, at night?

A. No, sir; nothing that we recognize.

Q. Nothing else?

A. No, sir.

Mr. TOTTEN: Now, your honor, I offer to read these rules.

Mr. MACKEY: I object.

The COURT: I think the objection must be sustained if it is insisted upon. I will note your exception, Mr. Totten."

And thereupon counsel for the defendant upon the evidence hereinbefore set forth offered to read to the jury the following rules from the printed book of rules for the protection of car-inspectors, which said rules are in the words and figures following, to wit:

"359. Foremen of car-inspectors report to and receive their instructions from the superintendent. They must obey the
46 orders of the superintendent of motive power. They are under the direction of yard or station masters."

"360. They must inspect all cars passing their stations, especially the running gear and brake fixtures, and make such repairs as may be required; they will send to the shop all cars not fit for service."

"364. They must see that freight cars are not loaded beyond their safe capacity and that the lading is properly distributed, and does not exceed the authorized height or width."

"365. When inspecting or making repairs to cars, they must protect themselves by placing a blue signal on each end of the car or train, as per rule No. 34."

But the court overruled the said offer and refused to allow the said rules to be read in evidence and given to the jury, to which ruling of the court in so refusing the said rules to be read in evidence and given to the jury, defendant's counsel then and there duly excepted, and the exception was thereupon noted at the time upon the minutes of the court, and defendant, by its counsel, prays the court to sign and seal this his third bill of exceptions, which is accordingly done, now for then, this 1st day of June, A. D. 1889.

M. V. MONTGOMERY, *Justice*. [SEAL.]

And thereupon counsel for the defendant read to the jury, by the permission of the court, rule No. 34, printed upon the back of the time tables or schedules which were posted in the office of the car-inspectors as above mentioned, which said rule is in the words and figures following, to wit:

"A blue flag by day, and a blue light by night placed on the end

of a car denotes that car-inspectors are at work under the car
47 or train. The car or train thus protected must not be coupled to or moved until the blue signal is removed by the car-inspector."

And thereupon the said witness (Downs) further testified that it would take two men from three-quarters of an hour to an hour to inspect a train of 25 cars if everything was all right, and to examine it carefully; but that ordinarily that much time was not expended in the inspection of a train; that the witness examined the car which was said to have had a defective brake; that the said brake was not connected properly; that it was not a recent thing, and the brake was not connected properly.

And thereupon the said witness further testified, in response to interrogatories propounded to him by counsel for the defendant, as follows:

"—. What were the orders in relation to brakes that were out of order on foreign cars, which did not belong to the Baltimore and Potomac Company?

A. Their orders were that no cars should be sent out unless the brakes were in order; unless it had a brake. That was their orders, and they were always to send it down, it did not matter whether it was foreign or not.

Q. If the brake was out of order what were the orders?

A. They would repair the brake.

Q. No matter whether it was your own car or some other company's car?

A. It made no difference.

Q. Is it a usual or an unusual thing for cars belonging to a different railroad company to come over your tracks through Washington?

A. It is a very usual thing.

Q. What do you call a car that belongs to the Erie railroad?

A. We call them foreign cars.

Q. Is it a usual or an unusual thing for foreign cars to come over your track?

48 A. It is a very usual thing to come over the tracks.

Q. Have you any means of knowing where that car came from, the brake of which you inspected?

A. No, sir; I have not.

Q. It was loaded with oil?

A. I don't know.

Q. Was this an invariable rule or a variable rule which you had with reference to foreign cars?

A. That is a general rule.

Q. To repair all brakes?

A. To have a brake on every car, no matter whether it was foreign or not foreign.

Q. Were your rules to have a brake on in good order?

A. Well, they were presumed to have a good brake.

Q. One that would be efficient, do you mean?

A. Yes, sir."

And thereupon the defendant, to further maintain the issues on *his* part joined, produced as a witness one EDGAR H. PHILLIPS, who, being first duly sworn, testified that in March, 1887, he was in the employ of the defendant, The Baltimore & Potomac Railroad Company, as a conductor in the freight yard in this city; had been so employed by the defendant in this freight yard for about twelve years; was there at time of accident running with the shifting engine No. 327; that on the night of the 17th of March, 1887, the night of the accident, he was engaged in the "Jersey yard" in shifting cars; that they got down to the Jersey yard about 9.55 o'clock in the evening, and took down with them about twenty-five cars, which they first shifted around where they belonged; that it took them about half an hour to dispose of those cars; that they went over onto the other side of the yard to shift the fast freight which was coming in from the north; that said train was brought in by engine No. 307 and placed on No. 1 track; that said fast-freight train arrived after they got down to the Jersey yard about ten or fifteen minutes; that they went to work upon said train to get
49 out such cars as were to go south on the fast freight; that there were not over six cars in the said freight train to go south; that the cars which were for Washington were put over on another track; that then Robert A. Brown, the deceased, told them that they had a broken bull-nose down there which he wanted to fix; that he asked the witness to pull the cars apart, and witness told him that he would go down there and pull them apart; that he went down there and pulled the cars apart; that witness told deceased he was not going to shift any more of those cars; that said cars were pulled apart to a distance of about forty feet; that Brakeman Hillary pulled the pin and uncoupled the cars in the first instance, and that the witness ordered the cars to be cut loose; that at that time he was talking to Robert A. Brown, who was standing right where the cut was made; that after the pin was pulled the witness (Phillips) gave the signal to pull ahead and then went up towards the engine; that he stopped the engine when Rob't A. Brown, the deceased, said "That will do," by giving the engineer the shut-off signal with his lamp by swinging it; that thereupon the engineer (Smith) called to him and he went up towards the engine; that the engineer then said he had no more water to do any shifting with, and I told him I hadn't anything to do, and they were not going to do any more shifting on that train, and I asked him to take a load of stock from the lower end up to the warehouse, and stop at Sixth street and get water. He said: "Well, I will try it." So I said to the brakeman, Teiling, when I stopped talking to the engineer, "How is it?" He said, "All O K." I said: "Go up and set this brake." He got up and put it on. I told Mr. Brown, after I pulled the cars apart, that I was going to leave them standing there.

By Mr. MACKEY:

"Q. You say you told him what?

A. I told him I was going to leave the cars standing.

50 By Mr. TOFTEN:

Q. You told him that you were not going to take them any place else?

A. Yes, sir.

Q. Were they loaded with anything to go south?

A. No, sir.

Q. Were they intended for Washington?

A. Yes, sir."

And thereupon the said witness further testified that the car with a broken bull-nose was a coal hopper loaded with coal; that after Teiling cut the cars loose they did not stand but ran back; that Hillary came up about the time Teiling was pulling the pin and told him not to pull it, but that the pin had already been pulled; that at that time he had not the slightest idea that Brown was under the car; that there was no blue light to indicate that the men were at work under the car; that it was a dark night with the wind blowing and it was snowing; that he thinks there were three cars in the cut he made at that time; that the first car was a stock car loaded with coal oil, and that the next two cars were loaded with coal; that there is "a right smart grade there on Jersey avenue;" that one brake is sufficient to hold three cars in such a place as that if it is a good brake, and that one brake is supposed to hold eight cars; that at the time of the accident an engineer, a conductor, a fireman and two brakemen constituted the usual crew with a shifting engine; that Hillary and Teiling were good brakemen, and that they were stout and heavy men; that he (witness) had been conductor in this freight yard for about 12 years; that after the first cut until the time the cars started down back was about five minutes; that when the engine was cut loose from the train it came back very gently; that after the car had run back and struck the car with the defective draw-head they coupled up to them again and pulled them away and then witness ran down and got hold of Brown; that when Engineer Smith tried to pull
51 the cars away after the train had been cut the brake was set and the engine could not start the train until the brake was relieved; that Teiling is a pretty heavy man and put his whole weight upon the brake when he set it, and that it seemed to take hold; that the witness saw Brown and spoke to him two or three times before he went down to pull these cars apart for him, and that when he first saw him, he (Brown) was coming down the track; that there were 21 cars in the said train, all loaded.

Thereupon, in response to interrogatories propounded by counsel for the defendant, the witness further testified as follows:

"Q. If Brown had not asked you to do that would you have done anything more to that train?

A. No, sir; only to take the stock up from the other end.

Q. You said that you did not know that Brown was at work under the car?

A. No, sir; I knew he was going to work there, but I didn't know he was in there.

Q. Did you see a blue light?
A. No, sir.
Q. In the night-time do you look for blue lights always?
A. Yes, sir.
Q. And you are guided by them?
A. Yes, sir."

And thereupon the said witness further testified that it usually required about ten minutes for car-inspectors to inspect a freight train like that; that they go around the train and look at the running gear and tap on the wheels all the way around.

And thereupon, on cross-examination by counsel for the plaintiff, the witness further testified that Brown stated to him at the time the cars were cut apart:

52 "Ed.—in fact they always called me Shorty. Shorty, you can take these three cars up and shift them, and by that time I will have this bull-nose put in. I said: Mr. Brown; I said: 'No, I don't want to shift those cars. I have got out all the southern cars that Mr. Stewart told me to take, and I am going to leave them standing here. That was the last words that I said to Mr. Brown;' that by the time said cars were shifted he would have the bull-nose fixed."

And thereupon in response to interrogatories propounded on cross-examination by counsel for the plaintiff, the witness testified as follows:

"Q. It would not have taken you very long to shift those other cars, would it?
A. It would have taken that much more time to shift them. The engineer did not have water enough to shift with.
Q. He supposed that you were going to take these three cars off from her, didn't he?
A. Well, according to the man going in there, he did; but that was not what I told him.
Q. You told him you were not going to shift them?
A. I told him so most emphatically. I told Mr. Brown I was going to leave those cars standing there.
Q. Which cars?
A. Those that I pulled apart.
Q. You said you were going to leave them standing there?
A. I did, sir.
Q. You told him that you were going to leave them stand there?
A. Yes, sir; I did.
Q. Then you went up to the engineer, and the engineer said he wanted water?
A. The engineer called me, and I went to the engine, and he said he wanted water.
Q. Then you commenced to cut loose, didn't you; or rather you told Teiling to cut loose?
A. Yes, sir; I told him to cut loose."

53 The witness further testified, on cross-examination, that if the brake had not been sufficient to hold the cars it would have slowed the motion of the cars in running down.

And thereupon the said witness testified, in response to interrogatories by counsel for the plaintiff on cross-examination and by counsel on redirect examination for the defendant, as follows:

"—. Now, Mr. Phillips, if a blue light had been on that train it would have made no difference in your action, because you did not intend to move those four cars?

A. Yes, sir; because they would not have put the lamps on until I got away, and then there would have been nobody hurt.

Q. If those blue lights had been on there it would have made no difference in your action in respect to telling Teiling to get up and put on these brakes?

A. Certainly. If a blue light had been there, I would have gone down there to notify them I was going to leave the cars stand there.

Q. Did you leave them stand there?

A. Yes, sir.

Q. Was not that just what you would have done?

A. Not if I had hold of cars with an engine and they had a blue light on those cars and I was going to cut loose from them. That means that they were in there at work, and I would have gone down there and notified them I was going to cut loose the engine and go away.

Q. Did he not tell you he was going in there to work. You say you told Brown you did not intend to move those cars?

A. Yes, sir; I told Brown I was going to leave the cars standing. That has been my statement all along.

Q. You told him you were going to leave them stand there?

A. Yes, sir.

54 Q. Did you not leave them standing there so far as you were concerned?

A. Yes, sir; I had to go away from there to get water."

Redirect examination.

By Mr. TOTTEN:

"Q. If you had seen a blue light there you say you would have gone back again. Did you intend to leave those cars stand just where you stopped them?

A. Yes, sir.

Q. What was in your mind when you observed there was no blue light; that they were or were not under the car?

A. From my statement I told him I was going to leave those cars standing there, and of course that meant to men of sense that they had no right to go in there until I got away, and then to protect themselves with a blue light. An engine coming up against those cars at the other end would have crushed him to death.

Q. You are guided under those circumstances entirely by a blue light?

A. When there is a blue light on a car I never touch a car until they take it down.

Q. Was there any other engine at work around there on that night?

A. Yes, sir; there was an engine at the lower end of the yard, an engine that was going to take the train going south.

Q. You took away, you say, 10 cars on the first cut and carried them off for the south-bound train?

A. Yes, sir.

Q. Then you came back for three or four more?

A. Yes, sir.

Q. That makes 14?

A. I did not take them off. I just pulled them apart.

55 Q. Then all that remained of the train which came in was seven cars?

A. Yes, sir.

Q. This one with the broken bull-nose was one of them?

A. Yes, sir.

Q. And there was another freight car at the other end of the train?

A. Yes, sir.

Q. And there was an engine working out towards the other end?

A. Yes, sir; at the lower end.

Q. Was there any light on that?

A. No, sir; there was no light on the cars that I saw.

Q. In working at such a place as that, was it usual and customary to put a blue light on the ends of the car? Suppose he was at work on this broken bull-nose would he have hung a light on the stock car after your engine went away?

A. Yes, sir.

Q. That is the place where the blue light would be?

A. Yes, sir.

Q. Because somebody would run into it and jar it down against him?

A. Just as likely as not; yes, sir.

Q. You expected when you went away that he would put his blue light on there before he went away?

A. It was their business to do it, and my business not to run against them until they took it down."

And thereupon the defendant, to further maintain the issues on its part joined, gave evidence to the jury further tending to show that Charles Hillary was a brakeman with the said shifting engine on the night of the accident; that he was standing at the place where the cars were cut to allow the inspectors to repair the defective draw-head; that Brown walked right up to the car and

56 caught hold of the bull-nose and pulled it out; that Hillary then left and walked up towards the engine, and saw Teiling pulling the pin; that he called to him not to pull the pin; that he had his hand on the end of the stock car and felt it moving; that he called out to Teiling not to pull the pin, but it was too late; that

thereupon he immediately ran back to where the men were at work and called to the men at work on the car to look out; that the distance between the end of the cars which were cut off and the car at which Brown was at work was about thirty-seven feet; that the wind was blowing hard and carried the sound away; that it was cold and snowing; that three cars were cut off; that he had been a brakeman for about three years; that there was no blue light around where the men were at work; that he did not see any chalk marks upon the car which was said to have had a defective brake, and he did not remember to have ever seen the said stock car afterwards.

The defendant, to further maintain the issues on its part joined, gave evidence to the jury tending to show that the shifting engine was a first-class yard engine, what is known as a yard "mogul" engine; that it was the largest engine of its kind built, and was thoroughly equipped with air brakes and all modern improvements.

And thereupon the plaintiff, to further maintain the issues on his part joined, gave evidence in rebuttal tending to show that rule No. 34, hereinbefore mentioned, was printed upon the back of a schedule or time-table having upon the front part thereof the time for the arrival and leaving of trains; that said schedule was tacked upon the wall in the office of the building used by car-inspectors with the printed rules, against the wall, so that they could not be seen or read by car-inspectors, and they were not brought to the notice of said car-inspectors.

And thereupon, the testimony on both sides having been closed and given to the jury, as set forth in the foregoing bills of
57 exceptions, which *is* referred to as part hereof, the defendant, by its counsel, moved the court to instruct the jury upon the whole evidence as aforesaid, to return a verdict for the defendant; but the court overruled said motion and refused to so instruct the jury to return a verdict for the defendant, as requested, to which ruling of the court in so refusing to instruct the jury to return a verdict, the said defendant, by its counsel, then and there duly excepted, and said exception was noted at the time upon the minutes of the court, and counsel for the defendant prays the court to sign and seal this his fourth bill of exceptions, which is accordingly done, now for then, this 1st day of June, 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

And thereupon, the evidence on both sides having been closed and given to the jury, the plaintiff, by his counsel, upon the evidence set forth in the 1st, 2d, 3d and 4th bills of exception, which are hereby referred to and made a part hereof, prayed the court to instruct the jury as follows:

The jury are instructed that the employees of a railroad corporation have a right to expect that the corporation will, as far as possible, provide for their protection in moving its trains sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes; if therefore the jury believe from the testimony that

the brake set by the brakeman Teiling was defective at the time of the accident and that by the exercise of reasonable care and caution the defendant could have known said brake to be defective, then it is liable and their verdict must be for the plaintiff, provided they believe from the testimony that the accident was caused by reason of said defective brake.

58 To the granting of which prayer the counsel for the defendant interposed and objected, but said objection was overruled and said prayer was, by the court, allowed and read to the jury, whereupon the defendant, by its counsel, duly excepted to the granting and reading of said prayer, and the said exception was noted at the time upon the minutes of the court, and the counsel for the defendant prays the court to sign and seal this his 5th bill of exception-, which is accordingly done, now for then, this 1st day of June, A. D. 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

And thereupon the evidence on both sides having been closed and given to the jury, the plaintiff, by his counsel, upon the evidence set forth in the 1st, 2d, 3d and 4th bills of exception-, which are hereby referred to and made a part hereof, prayed the court to instruct the jury as follows:

5. The jury are instructed that if they believe from the evidence the brakes set by Brakeman Teiling as detailed in the evidence would, if then in good order, have prevented the cars from moving, or at least would have tended to retard such movement so as to have given sufficient time to notify Brown of his danger and to have enabled him to escape, then if the jury believe from the evidence that the brake was not in good order at the time of the accident, and further, that the defendant by the exercise of reasonable care could have known of its defective condition, their verdict must be for the plaintiff.

To the granting of which prayer the counsel for the defendant interposed and objected, but said objection was overruled and said prayer was, by the court, allowed and read to the jury, whereupon the defendant, by its counsel, duly excepted to the granting

59 and reading of said prayer, and the said exception was noted at the time upon the minutes of the court, and the counsel for the defendant prays the court to sign and seal this his 6th bill of exception-, which is accordingly done, now for the*m*, this 1st day of June, A. D. 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

And thereupon the evidence on both sides having been closed and given to the jury, the plaintiff, by his counsel, upon the evidence set forth in the 1st, 2d, 3d and 4th bills of exception, which are hereby referred to and made part hereof, prayed the court to instruct the jury as follows:

8. "The jury are instructed that if they believe from the evidence the plaintiff to be entitled to a verdict, then their verdict should be in such a sum not exceeding ten thousand dollars as will,

as far as possible, compensate the widow and children of the deceased for the pecuniary loss suffered by them by reason of his death."

To the granting of which prayer the counsel for the defendant interposed and objected, but said objection was overruled and said prayer was, by the court, allowed and read to the jury, whereupon the defendant, by its counsel, duly excepted to the granting and reading of said prayer, and the said exception was noted at the time upon the minutes of the court, and the counsel for the defendant prays the court to sign and seal this his 7th bill of exception-, which is accordingly done, now for then, this 1st day of June, A. D. 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

And thereupon the defendant, by its counsel, the evidence on both sides having been closed and given to the jury, prayed the
60 court, upon the evidence set forth in the 1st, 2d, 3d and 4th bills of exception, which are hereby referred to and made part hereof, to instruct the jury as follows:

"2. Upon the evidence in this cause the burden of proof is upon the plaintiff to show to the jury, by satisfactory evidence, that his intestate did not, by his own want of ordinary care, contribute to bring about the accident which resulted in his own death."

But the court refused to grant said prayer and allow the same to be read to the jury, to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was, at the time, noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this his 8th bill of exceptions, which is accordingly done, now for then, this 1st day of June, A. D. 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

And thereupon the defendant, by its counsel, the evidence on both sides having been closed and given *of* the jury, prayed the court upon the evidence set forth in the 1st, 2d, 3d and 4th bills of exception, which are referred to and made a part hereof, to instruct the jury as follows:

3. "Upon the pleadings in this cause the burden of proof is upon the plaintiff to show to the jury, by satisfactory evidence that his intestate did not, by his own want of ordinary care, contribute to bring about the accident which resulted in his own death."

But the court refused to grant said prayer and allow the same to be read to the jury, to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the de-
61 fendant's counsel prays the court to sign and seal this his 9th bill of exceptions, which is accordingly done, now for then, this 1st day of June, A. D. 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

And thereupon the defendant, by its counsel, the evidence on both sides having been closed and given to the jury, prayed the

court upon the evidence set forth in the 1st, 2d, 3d and 4th bills of exception, which are referred to and made part hereof, to instruct the jury as follows:

5. "Upon the pleadings and evidence in this cause the burden of proof is upon the plaintiff to show to the jury by satisfactory evidence that his intestate (Brown) did not by his own want of ordinary care contribute to bring about the accident which resulted in his own death."

But the court refused to grant said prayer and allow the same to be read to the jury; to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this his 10th bill of exceptions, which is accordingly done, now for then, this 1st day of June, A. D. 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

And thereupon the defendant, by its counsel, the evidence on both sides having been closed and given to the jury, prayed the court, upon the evidence set forth in the 1st, 2d, 3d, and 4th bills of exception, which are referred to and made a part hereof, to instruct the jury as follows:

7. "Unless the jury shall be satisfied from the evidence that a defect in the brake, which was set by Teiling on the stock
62 car just before the accident, was the sole cause of the injury to Robert A. Brown, the plaintiff's intestate, and that said brake was in such defective condition at the time the said stock car was by the defendant put into its train, the plaintiff cannot recover, and the burden of proof is upon the plaintiff to show, by evidence satisfactory to the jury, that said brake was in such defective condition before said car was by the defendant put into the said train."

But the court refused to grant said prayer and allow the same to be read to the jury, to which opinion and ruling of the court the defendant, by its counsel duly excepted, and the exception was, at the time, noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this his 11th bill of exceptions, which is accordingly done, now for then, this 1st day of June, A. D. 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

And thereupon the defendant, by its counsel, the evidence on both sides having been closed and given to the jury, prayed the court upon the evidence set forth in the 1st, 2d, 3d and 4th bills of exception, which are referred to and made a part hereof, to instruct the jury as follows:

"8. If the jury shall find from the evidence that the injury to Robert A. Brown resulted solely in consequence of some defect in the brake set by Teiling on the open or stock car next to engine and tender, and that the said stock car was not the property of the defendant but belonged to another railroad company, had been on the same evening and a short time prior to the accident, brought to the

defendant's yard, in Washington, in a freight train, with the brake in such defective condition, then the fact (if the jury shall so find the fact) that such injuries did so result, cannot be considered
63 as evidence to support the charge of negligence against the defendant, and the defendant is entitled to the verdict."

But the court refused to grant said prayer and allow the same to be read to the jury, to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception, was at the time, noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this his 12th bill of exceptions, which is accordingly done, now for then, this 1st day of June, 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

And thereupon the court voluntarily and upon its own motion and upon the testimony set forth in the 1st, 2d, 3d and 4th bill of exceptions, which is referred to as a part of this exception, instructed the jury as follows:

"I have thought best to advise you as the law of this case that you should address yourself at once to but one question, and the whole case will turn upon that question, and that is, so far as the predicate of the plaintiff is concerned, and to say nothing about a qualification to which I shall call your attention in a few moments. That is this: Was the defendant's car, or that car upon which this brakeman, Mr. Teiling, set that brake on that night, was that brake in a proper, reasonable condition,? If it was not in a proper, reasonable condition, did the cars roll back in consequence of that infirmity. Was the accident traceable to that? I will say here, gentlemen, that if you should be satisfied from the evidence in this case, that this brake was in a reasonably good condition, in good ordinary repair, and there was nothing wrong about it, then the plaintiff cannot recover, because that would end the case. But if you should reach the conclusion that it was not in proper
64 condition; that it was defective, then you will inquire further, if it had been in proper condition, would it have held the train. It is not disputed that it did not hold the train, or the train was not held and the cars rolled back and the accident took place. Now, would it have held the train had it been a proper brake in proper condition?

"If you should determine that the brake was in an imperfect condition, such a condition as I have described, and if it had been in a proper condition the train would not have rolled back as it did, and if you shall find that the deceased was not guilty of contributory negligence, then the plaintiff could recover. In this regard I read to you the plaintiff's third and fifth requests for instructions:"

(Here the court read the said prayer, which was set forth in the foregoing bill of exceptions numbered respectively 5 and 6 and then proceeded as follows:)

"So, you see, gentlemen of the jury, the only question, so far as the negligence of the defendant is concerned is, Was the brake de-

fective, out of order, not in reasonable repair, not reasonable for the occasion, and if not, was such fact the cause of the accident, or did it materially or directly contribute to it? If so, the plaintiff will be entitled to recover provided the other conditions exist."

To which ruling and instructions the counsel for the defendant then and there objected and excepted and the said exception was at the time duly noted on the minutes of the court, and the said counsel now pray the court to sign and seal this his 13th bill of exceptions, now for then, this 1st day of June, 1889, which is done accordingly.

M. V. MONTGOMERY, *Justice.* [SEAL.]

65 And thereupon the court, on its own motion, and on the testimony set forth in the foregoing bills of exception, attached hereto and which *is* made a part hereof, further instructed the jury as follows, to wit:

"Now, manifestly, you cannot estimate in dollars and cents exactly what the damages are in a case of this kind, if there be any at all. That is not possible. But you may and you should take into consideration the age of the man, his health and strength, his capacity to earn money as you discover it from the evidence, his family—who they are and what they consist of—and then, gentlemen, from all the facts and all the circumstances make up your mind how much this family, if anything, probably lose by his death; and that would be how much had this family a reasonable expectation of receiving; how much had they a reasonable expectation of receiving while he lived, if he had not been killed."

To which instruction the defendant, by its counsel, then and there objected and excepted, and the exception was duly noted, at the time, on the minutes of the court, and the court is now asked to sign and seal this the defendant's 14th bill of exceptions, which is accordingly done, now for then, this 1st day of June, 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

And thereupon the court, on its own motion, further instructed the jury, on the said testimony set forth in the foregoing bills of exceptions, hereto attached and made a part of this exception as follows, to wit:

"Now, gentlemen of the jury, you may take this case. I hope you understand it, and I have no doubt you do. Make up your mind, first, within the instructions of the court, was this defendant negligent; was that brake a bad brake; if it had been a good one would it have held this train. If you say the brake was all right, that ends the case. If you say that it was not right and that 66 a good brake would have held the car, then the next question is, Was the plaintiff's intestate himself negligent, imprudent or careless, contributing to the injury directly; and if so, the plaintiff could not recover. If not, he could recover."

To which instruction and ruling the defendant, by its counsel, then and there excepted, and the exception was, at the time, duly noted on the minutes of the court, and said counsel now prays the

court to sign and seal this his 15th bill of exceptions, which is accordingly done, now for then, this 1st day of June, 1889.

M. V. MONTGOMERY, *Justice.* [SEAL.]

67 *Motion to Strike Paper from Files.*

Filed April 25, 1890.

In the Supreme Court of the District of Columbia, in General Term, April 25, 1890.

MACKEY
vs.
THE B. & P. R. R. Co. } Law. No. 27931.

Now comes the plaintiff and moves the court in general term to strike from the files the paper filed in this cause and called a bill of exception, and also to dismiss the appeal taken in said cause.

And for grounds of said motion shows to the court that said so-called bill of exception purports on its face to be signed by one judge and tried before another.

FRANKLIN H. MACKEY, *P. P.*

Enoch Totten, Esq., att'y for def't:

Take notice that on Monday, April 28th inst., at the opening of court, I shall call up the above motion before the court in general term.

FRANKLIN H. MACKEY.

Motion for Correction of Clerical Error in Bill of Exceptions.

Filed April 29, 1890.

In the Supreme Court of the District of Columbia, in General Term, May, 1890.

FRANK H. MACKEY, Adm'r, &c.,
vs.
BALTIMORE & POTOMAC R. R. Co. } At Law. No. 27931.

68 And now comes the said defendant, The Baltimore & Potomac Railroad Company (the appellant here) and moves the court to strike out the name "Mr. Chief Justice Bingham," where it occurs in the second and third lines from the beginning of the bill of exceptions signed and filed in this cause, because said name was inserted through a clerical error. The cause was actually tried by Mr. Justice Montgomery, as the records of the court conclusively show.

ENOCH TOTTEN,
For B. & P. R. R. Co.

Proceedings in General Term Monday, October 6th, 1890.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning the first Monday, October 6th, 1890.

Present, presiding: Chief Justice Bingham and Justices Hagner, Cox, James, and Bradley.

MONDAY, *October* 27, 1890.

Session resumed pursuant to adjournment.

Present: Justices Hagner, Cox, and James.

* * * * * * *

69 FRANKLIN H. MACKEY, Administrator, &c., *vs.* THE BALTIMORE & POTOMAC R. R. Co. } Law. 27931.

Because it appears to the court here that there is no error in the record and proceedings of the special term or in its judgment, it is considered by the court here that the judgment of the special term be, and hereby is, affirmed, and that the appellee, complainant, recover against the appellant, defendant, as in his declaration claimed, together with the costs of the cause, and have his execution against the appellant and its surety, John Cassels.

Bond for Writ of Error.

Filed Nov. 19, 1890.

In the Supreme Court of the District of Columbia, the 19 Day of Nov., 1890.

FRANKLIN H. MACKEY, Administrator, &c., *vs.* THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } In Error. No. 27931. At Law.

Know all men by these presents that we, the Baltimore and Potomac Railroad Company, John Cassels, and J. Donald Cameron, are bound unto the above-named Franklin H. Mackey,

70 administrator of the estate of Robert A. Brown, in the sum of sixteen thousand dollars ($16,000.00), to be paid to the said Franklin H. Mackey, administrator, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 19th day of November, 1890.

Whereas the above-named Baltimore and Potomac Railroad Company and John Cassels have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Baltimore and Potomac Railroad Company and John Cassels shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY. [SEAL.]
JOHN CASSELS. [SEAL.]
J. DONALD CAMERON. [SEAL.]

Sealed and delivered in presence of—
FRANCIS B. MOHUN.

Witness as to signature of J. D. Cameron:
H. J. GENSLER.

Approved this 19 day of November, 1890.
E. F. BINGHAM,
Chief Justice.

71 Supreme Court of the District of Columbia.

Filed —— —, ——.

F. H. MACKEY, Administrator, vs. THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } At Law. No. 27931.

Justices Hagner, Cox, and James sitting.

Decided October 27, 1890.

Filed Nov. 29, 1890.

Mr. Justice HAGNER delivered the opinion of the court:

This was an action brought by the administrator of Robert A. Brown to recover damages in behalf of his wife and children resulting from the failure of the defendant railroad company to provide proper machinery for the conduct of its work.

The action was brought under the statute of 1885, chap. 126 (23 Stat., p. 307). The jury returned a verdict for eight thousand dollars in favor of the plaintiff, and an appeal is taken to the refusal of the court to grant certain instruction- offered by the defendant, and to its granting others offered in behalf of the plaintiff; and also to rulings of the court during the trial as to the admissibility of evidence. They are all presented in a bill of exceptions. There is no motion for a new trial upon the ground of excessive damages, or because the verdict was not supported by the evidence.

The facts disclosed seem to be these, though of course the parties vary in their version of parts of the transaction:

On the night of the 17th of March, 1887, a long freight train, containing twenty-five cars, arrived at the New Jersey Avenue yard

of the Baltimore and Potomac Railroad Company, in Washington, at about 10:30 o'clock. Brown was the principal night inspector at that yard. The engine which had drawn them from Baltimore left the train, and Brown, the plaintiff's intestate, together with another car-inspector, proceeded in the discharge of their duty to ascertain whether the cars were in proper condition to travel farther. They discovered that the fifth car from the front of the train had a broken draw-head or bull-nose, as it was called, and that it was impossible for that car to travel in safety until it was repaired. By that time the shifting engine had been attached to the front of the train, and Brown went to Phillips, the conductor in charge of the engine, and told him he had discovered the defective draw-head, and suggested he should pull the cars apart and give him entrance to the front end of the injured car, saying he could repair the injury in a few minutes, but that unless it was "repaired the whole thing would be shattered to pieces." The night was stormy and dark and snow was falling. Phillips thereupon ordered Hillary, one of the brakemen on the engine, to draw the fourth car apart from the fifth, so that Brown might do the work. The order was obeyed and the cars separated. Brown then went to the front end of the fifth car where he had found the broken draw-head. This was not over ten or twelve feet from the rear end of the fourth car, which, with the three front cars, remained attached to the engine. Brown at once pulled out the broken draw-head and began his operations, standing in front of the fifth car with his back to the four cars which had been detached.

He had some conversation with Phillips about pulling apart some other cars; but Phillips told him that he would not shift any more of the cars that night, as such were his orders from the yard master. Phillips also told him the four cars with the engine would stand where they were until he had finished the repairs. Soon afterwards the engineer informed Phillips he had not sufficient water in the tender. The conductor asked him if he could draw a load of stock up the road and stop at Sixth street and get water there. The engineer said he thought he could. To do this they proceeded to detach the engine from the four cars to leave them standing where they then were. Phillips then told Teiling, one of the brakemen, to get up and set the brake on the front car, next to the tender, for the purpose of holding those four cars in the position they then occupied. It was testified by employees of the company that one brake would have been sufficient, if in good order, to have held the four cars. To disconnect the cars from the engine the latter backed a little, and there was a slight concussion as it came back against the cars. The connecting pin was drawn out, and the engine moved off. Teiling had endeavored to set the brake on the front car, which was a stock car loaded with oil, and according to some of the witnesses, he seemed to use his very best efforts to force the brake down. Unfortunately it proved to be defective and not sufficient to hold, and the four cars, now released from the restraint of the heavy engine, began at once to move down grade

72 towards Brown, who was standing, with his back towards them, unconscious that the engine had been detached. The bystanders called out to warn him of his peril, but the cars were already upon him, and he was crushed to death.

The plaintiff contends it was culpable negligence on the part of the defendant to have placed in that train a car with an insufficient brake; that this negligence was the cause of the injury, and there was no contributory negligence on the part of the plaintiff. The defendants denied all negligence on their part, and interposed the further defence that Brown himself was guilty of contributory negligence, first, because being one of the car-inspectors on duty that night, he should have discovered the imperfection or the brake; and, further, because he did not exhibit outside of the car he was repairing a blue light, which the rules of the company required should be displayed whenever a person was doing repair work on a car. They further insisted they were not liable, because the car with the defective brake did not belong to them, but to a different railroad.

We proceed to notice the exceptions in their order.

The first exception taken by the defendant to the admission in evidence of the exemplification of the letters of administration granted to the plaintiff cannot be sustained. Section 2 of the act of 1885, ch. 126, expressly declares that the action to recover damages shall be brought in the name of the personal representative of the deceased; and there was no allegation that the exemplification was not in proper form.

The second exception, which was to the refusal of the court to direct a verdict for the defendant after the close of the plaintiff's case in chief, was necessarily abandoned when the defendant proceeded to offer evidence in its own behalf.

The third exception was taken to the refusal of the court to allow the defendant to read to the jury three rules from the printed book of the defendant "for the protection of car-inspectors." They were offered on the theory that the deceased was bound by their provisions; but there was no proof they had ever been brought to his notice. Downs, the chief car-inspector and foreman of repairs, testified he had never given Brown the book nor read the rules to him, but that he gave instructions to him verbally. It would have been most improper, under such circumstances, to admit the rules as imputing knowledge of their contents to the deceased. Indeed, they profess on their face to be regulations for the "foremen of car-inspectors," which was the position of the witness Downs, while Brown was a subordinate under him, although he was the leading car-inspector at the Jersey yard on the night of the accident.

The court went further than it was bound to go, when it allowed rule 34, relating to the placing of blue lights on cars under repairs, to be read; although it was only shown to have been "printed on the back of the time tables or schedules which were posted in the office of the car-inspectors." If, as was insisted by the plaintiff's counsel, this time-table was nailed on the wall with the face out-

wards, of course the rule printed on the back could have afforded no possible information to any one in the office.

The court was correct in its refusal to direct a verdict for the defendant at the close of the testimony on both sides, which is the subject of the fourth exception. There should be evidence adduced establishing contributory negligence on the part of the plaintiff, in relation to which fair-minded men could not draw different inferences, to justify the court, under this defence, to withdraw the facts from the consideration of the jury; and such was not at all the state of case here.

The fifth exception was taken to the granting by the court of the two following prayers of the plaintiff:

1. "The jury are instructed that the employees of a railroad corporation have a right to expect that the corporation will, as far as possible, provide, for their protection in moving trains, sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes; if, therefore, the jury believe from the testimony that the brake set by the brakeman Teiling was defective at the time of the accident, and that by the exercise of reasonable care and caution the defendant could have known said brake to be defective, then it is liable, and their verdict must be for the plaintiff; provided they believe from the testimony that the accident was caused by reason of said defective brake."

2. "The jury are instructed that if they believe from the evidence the brake set by Brakeman Teiling as detailed in the evidence would, if then in good order, have prevented the cars from moving, or at least would have tended to retard such movement so as to have given sufficient time to notify Brown of his danger and to have enabled him to have escaped, then if the jury believe from the evidence that the brake was not in good order at the time of the accident, and further that the defendant by the exercise
73 of reasonable care could have known of its defective condition their verdict must be for the plaintiff."

These instructions, in our opinion, correctly express the law of the present case as to the duty of the defendant to provide proper machinery and appliances in the conduct of its business, and its liability to its employees who may be injured by its failure to comply with this duty. This principle excludes the consideration in such cases of the defence that the imperfection in the machinery was caused by the negligence of a fellow-servant in the same employment. The master's obligation to supply efficient agencies for the proper management of his business is implied in the contract with the injured party, and public policy and humanity absolutely require that he shall be held to so reasonable an obligation. The neglect of the fellow-servant under such circumstances, is held to be the neglect of the master, and he cannot defend himself by attempting to place the blame upon another of his employees.

This principle is well expressed in the able opinion of Mr. Justice Field in Northern Pacific Railway Company *vs.* Herbert, 116 U. S., 643. The action in that case was brought by a brakeman em-

ployed in the yard of the railroad company, where its cars were switched upon different tracks and its trains were made up. According to the statement of the learned justice, "It was his duty, among other things, to set and to loosen the brakes of the cars whenever necessary and whenever ordered to do so by the yard master. At the time mentioned he was ordered to stop with the brakes two cars, which had been switched upon a track in the yard. In obedience to this order he went upon the rear car and attempted to set the brake attached to it; but the brake was so badly broken and out of order that it could not be made to work. As soon as he discovered this he stepped on the forward car in order to stop it. The brake on that car was a step-brake; and in order to work it he was obliged to place his foot on the step attached to the car below the top, and this brought his foot and leg between the two cars. This brake was also out of order, and while attempting to set it, his foot being upon the step, the car struck another car on the track and was suddenly stopped. The draw-bar and bumper of the rear car had been pulled out and for want of them the two cars, when the forward one was suddenly stopped, came violently together, crushing his leg so that amputation became necessary." The justice, after stating the law as to exemption of employers from liability for the negligence of fellow-servants, proceeds:

"It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service; and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by the omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matter his employer will make adequate provision that no danger shall ensue to him." The justice then refers to a large number of cases, particularly to Hough *vs.* Railroad, 100 U. S., 213, and concludes this part of the case in these words: "According to the authorities cited there can be no question as to the liability of the railroad company to the plaintiff for the injuries he sustained. If no one was appointed by the company to look after the condition of the cars, and see that the machinery and appliances used to move and to stop them were kept in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company. His negligence was its negligence, and imposed a liability upon it."

It is insisted by the defendant's counsel that the words "as far as

possible," introduced into the first of the instructions under examination, unduly extended the liability of the defendant to provide appropriate machinery, by exacting the use of the best possible appliances, instead of those reasonably good and safe. We think this is a misunderstanding of the language of the instruction. Its true meaning will be seen by slightly changing the collocation of the members of the sentence, and using the words complained of distributively, so that the sentence may read thus: "The employees have a right to expect that the corporation will provide for their protection, in moving its trains, sufficient machinery in good condition, (as far as possible,) and that it will exercise reasonable
74 care and caution, (as far as possible,) not to use cars on its trains having defective brakes," etc. Viewed in this, their proper sense, the words complained of imply rather a limitation or moderation of the rigor of the rule than an addition to its exactions.

A similar criticism of the language of an instruction given by this court in special term in McDade *vs.* R. R. Co. was noticed by the Supreme Court in 135 U. S., 575. The trial justice, defining the obligations of the master in respect to providing proper machinery, told the jury he was not a guarantor of its safety, but "was only bound to use ordinary care and prudence in the selection and arrangement and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctions as reasonably safe." The counsel for the railroad objected in the Supreme Court to this form of expression as erroneous, without authority, and unknown in the judicial writings on the subject; but the Supreme Court affirmed its correctness and declared the addition imposed no additional obligation upon the master, but relaxed the rigor of the rule in its favor.

The principal objection to this instruction and to that embodied in the sixth exception was based upon the consideration that the car with the defective brake did not belong to the defendant, The Baltimore and Potomac Company, but was the property of the Pennsylvania Company, which we are to consider as a foreign company upon the record before us. The appellant's counsel adopts the language of the court in Ballou *vs.* Railroad Company, 54 Wis., 257, that one company receiving a loaded car from another company is entitled to presume that it had been properly constructed, had passed the inspection of properly skilled persons, and was reasonably fit for the use to which it was applied when received. The position was presented to the trial court by the seventh and eighth prayers of the defendant, incorporated in the eleventh and twelfth exceptions, which were refused by the presiding justice. These prayers are as follows:

"Unless the jury shall be satisfied from the evidence that a defect in the brake, which was set by Teiling on the stock car just before the accident, was the sole cause of the injury to Robert A. Brown, the plaintiff's intestate, and that said brake was in such defective condition at the time the said stock car was by the defendant put into its train, the plaintiff cannot recover, and the burden

of proof is upon the plaintiff to show, by evidence satisfactory to the jury, that said brake was in such defective condition before said car was by the defendant put into the said train."

"If the jury shall find from the evidence that the injury to Robert A. Brown resulted solely in consequence of some defect in the brake set by Teiling on the open or stock car next to engine and tender, and that the said stock car was not the property of the defendant but belonged to another railroad company, and had been on the same evening and a short time prior to the accident, brought to the defendant's yard, in Washington, in a freight train, with the brake in such defective condition, then the fact (if the jury shall so find the fact) that such injuries did so result, cannot be considered as evidence to support the charge of negligence against the defendant, and the defendant is entitled to the verdict."

Some of the cases cited by counsel in support of this contention seem to sustain it, though none go to the full extent claimed in these prayers; but we are satisfied, after full examination, that the reason of the matter and the weight of authority are to the contrary.

All persons must have observed that the great through trains, especially of freight cars, are composed of cars belonging to different roads; and frequently the proportion of such cars belonging to the particular road over which they are passing is very small. They come from all portions of our country and often from Canada and Mexico. They are transported along each successive road for hire, and only for that consideration. The employees of such road are obliged to handle every car in the train in the same manner, without respect to its ownership, and are exposed to the same dangers from defects of construction or mechanical appliances that may attend the management of the cars belonging to the road that employs them. It would be most unreasonable and cruel to declare, that while the faithful workmen may obtain compensation from a company for defective arrangement of its own cars, he would be without redress against the same company if the damaged car that occasioned the injury happened to belong to another company. The company on whose road the injury occurred, besides being free from all expense of repairs, would, in such case, receive its hire for the transportation, undiminished by any reclamation from its employee or his family for the grossest form of negligence in the construction or repair of the car. Of course it would be impossible to obtain redress from the company owning the car, as it might be separated from the scene of the accident by many intervening roads.

75 This particular point has recently been carefully considered by the court of appeals of New York, in several cases which commend themselves to us as containing the proper statement of the law:

In Gottlieb *vs.* Railroad, 100 New York, 466, the action was brought to recover damages for personal injuries received by the plaintiff while in the discharge of his duties as a brakeman on a freight train of the defendant. He had been ordered to couple two cars, which had broken apart in the night-time while under way; and

he stood in the usual position that brakemen occupy, between the cars, when engaged in this duty. There is always supposed to be sufficient space left between two cars in a train by reason of the projection of the bumpers, to allow a man to stand there without injury. It turned out that the two cars were not provided with proper bumpers; those attached consisting only of pieces of plank of insufficient thickness, nailed on the cars, so that there was only a space of about six inches between the cars when the bumpers met. In consequence of this defect the plaintiff, while trying to make the coupling was badly crushed as the cars came together.

The court said: "The defendant was under obligation to its employés to exercise reasonable care and diligence in furnishing them safe and suitable implements, cars and machinery for the discharge of their duties, and upon the assumption that the defendant was responsible for the condition of these cars, as if they were owned by it, there can be but little doubt that the evidence was ample to show that it had failed in its duty to the plaintiff. The defect was an obvious one, easily discoverable by the most ordinary inspection, and it would seem to be the grossest negligence to put such cars into any train, and especially into a train consisting of cars of different *gauge*. But these two cars did not belong to the defendant. They belonged to other companies, and came to it loaded, and it was drawing them over its road to their destination. They were in good repair, and the defects were in their original construction, they being just as they were originally made. The defendant claims that it was bound to receive and transport these cars over its road, and was under no responsibility for any defects in their structure, and that the plaintiff, upon entering into its employment, assumed all risks from such defects." The court refers to all the cases on the subject. Among those cited for the railroad were Mackin *vs.* R. R. Co., 135 Mass., 201; and Ballou *vs.* Railroad, 54 Wis., 257, and the other cases cited by defendant's counsel in his argument in this case, while on the other side it cites Jetter *vs.* Railroad, 2 Abb. Ct. App. Dec., 458; Miller *vs.* R. R., 99 N. Y., 607, and Jones *vs.* The Railroad, 28 Hun., 364. In the last case, the plaintiff's intestate, a brakeman, was attempting to climb upon a freight car, and one of the iron rungs, which was defective, broke, and he fell to the ground and was killed; and it was held the defendant was liable, although the car belonged to another company. The opinion proceeds: "It will thus be seen that the utterances of judges as to responsibility of one company for the defective cars of another company drawn over its road are not entirely harmonious, and yet we think all the authorities hold that the company drawing the cars of another company over the road owes, in reference to such cars, some duty to its employees. It is not bound to take such cars if they are known to be defective and unsafe. Even if it is not bound to make tests to discover secret defects, and is not responsible for such defects, it is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects

visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars—so much at least is due from it to its employees. The employees can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. The rule imposing this responsibility is not an onerous or inconvenient or impracticable one. It requires, before a train starts, and while it is upon its passage, the same inspection and care as to all the cars in the train."

In Goodrich *vs.* N. Y. C. & H. R. R. R. Co., 116 N. Y., 399, decided in 1889, the ruling in 100 N. Y. was adopted by the court to its full extent. In that case also, the plaintiff, a brakeman in the employ of the defendant, sued to recover damages for injuries received while engaged in coupling cars on its road by reason of the alleged negligence of the railroad company. The plaintiff with other workmen of defendant was sent from Albany to Fishkill to take charge of a circus train which was to come upon the defendant's road from the New England road. After the circus train had been switched upon defendant's road, the plaintiff was ordered by the conductor to couple some of the cars of that train to some stationary
76 cars on the same track. It was dark, but he had a lantern. When the cars to be coupled were within a few feet of each other he stepped between them, and then discovered the bumper of the moving car was lower than that of the stationary car. He raised the link thinking he could make it enter the bumper of the stationary car, but he failed to do so, and his hand was caught between the deadwoods (projections on each side of the bumpers) and severely crushed. The bumper on the moving car hung lower than it was intended to do by reason of the staple in which it played being broken. The particular point now under examination was thus disposed of by the court: "It was decided in Gottleib *vs.* N. Y., L. E. & W. R. R. Co., 100 N. Y., 462, that a railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars; that it owes this duty as master, and is responsible for the consequences of such defects as could be disclosed or discovered by ordinary inspection; that when cars come in from another road which have defects, visible or discernable by ordinary examination, it must either remedy such defects or refuse to take them."

The seventh prayer of the defendant is further incorrect, because it limits the liability of the defendant to the supposition that the brake was in a defective condition when put on the train by the defendant; in other words, that if the brake was plainly shown to have become broken while on the trip from Baltimore to Washington, there would be no liability.

The prayer of the plaintiff on the subject of damages is correctly expressed.

The second, third and fourth prayers of the defendant present the proposition that the burden of proof was upon the plaintiff to show he was not guilty of contributory negligence. This has so often been held to be incorrect that it is needless to do more than say that we affirm the ruling of the justice below in refusing to grant them.

No other instruction on the subject of contributory negligence was asked by the defendant.

The thirteenth exception is taken to the charge of the court, reaching over nearly two printed pages without specifying what portions of the language used was considered incorrect. Many of the statements of the judge therein contained must be admitted to be undoubtedly correct; and when such is seen to be the case a general objection to the entire charge cannot be sustained.

The expression most particularly objected to in the charge is this: "The only question so far as the negligence of the defendant was concerned was, Was the brake defective, out of order, not in reasonable repair, not reasonable for the occasion?" This, in our opinion, was not objectionable. The word "occasion" signifies "necessity or need," as well as "a particular time," but in either sense it was correctly used in the instruction. The brake should not only be suitable for fair weather, but for a storm such as was prevailing when the deceased met his death. To hold otherwise would be to allow a railroad company to leave passengers and employees without efficient safeguards against disaster at the very time they are most needed.

The fourteenth exception was taken to a further part of the charge, in which the justice told the jury in estimating the amount of damages to take into consideration the age of the deceased, "his health and strength," * * * "his family and who they were and who they consist of." It is insisted there was no evidence as to the "strength" of the deceased, and that it was unimportant to a just verdict whether he left many or few children, and whether they were young or old; and that reference to these topics was calculated to excite the sympathies of the jury against the company. But it was proved at the trial that Brown was thirty-four years of age, a competent workman and in sound health; that he walked right up to the car and caught hold of the bull-nose and pulled it out without difficulty; and these facts certainly tended to prove that he was possessed of considerable physical strength. But the expression "health and strength" was evidently used by the justice only as an emphatic manner of calling attention to the state of his health; and would have been correct in that sense; as strength does not necessarily mean physical power, but may also imply efficiency, mentally or intellectually. We cannot think this criticism of the charge was well taken.

The reference to the family of the deceased, and who they consisted of, was entirely proper. The statute itself contains no direct rule by which the jury is to assess damages, the whole question being left to them, subject only to the limitation that the recovery is not to exceed the sum of ten thousand dollars. It was therefore very proper for the court to say something by way of instruction on this subject; and the justice very naturally turned to other parts of the statute for guidance. Section 3 declares the damages recovered shall not be appropriated to the payment of the debts or
77 liabilities of the deceased, but shall inure to the benefit of his family; and section 1 provides they "shall be assessed with

reference to the injury resulting from such act, neglect or default causing death, to the widow and next of kin of such deceased person." Of course the injury resulting to the beneficiaries indicated would be much less where the deceased was an old man, with no children, and supported by others, than it would be in the case of a young man with a large number of little children entirely dependent on him for food and clothing; and the purpose of the law could be gratified properly by the jury in their verdict only by keeping in mind the condition and needs of the family in whose favor the verdict was sought.

The fifteenth exception was taken to a further part of the court's charge to the jury, which contains some statements clearly right; and in our judgment nothing that was incorrect. It supplied a sufficient instruction as to the alleged contributory negligence of the deceased, leaving that question to the decision of the jury, who, in our opinion, were fully justified in determining that issue in favor of the plaintiff.

The rulings below are therefore affirmed.

By the court.

A. B. HAGNER.

78 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Franklin H. Mackey, administrator of the estate of Robert A. Brown, plaintiff, and The Baltimore and Potomac Railroad Company and John Cassels, being 27931 at law, a manifest error hath happened, to the great damage of the said Baltimore & Potomac Railroad Company and John Cassels, as by their complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of November, in the year of our Lord 1899, and of the Independence of the United States the one hundred and fifteenth.

R. J. MEIGS, *Clerk.*

79 *Citation to the Supreme Court of the United States.*

The United States of America to Franklin H. Mackey, administrator of the estate of Robert A. Brown, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the District of Columbia, wherein The Baltimore and Potomac Railroad Company — John Cassels are *is* plaintiffs and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety.

E. F. BINGHAM, *Chief Justice.*

On this — day of November, in the year of our Lord one thousand eight hundred and ninety, personally appeared before me the subscriber, —— ——, and makes oath that he delivered a true copy of the above citation to —— ——.

—— ——.

I acknowledge due service of the above citation this 24th day of November, 1890.

FRANKLIN H. MACKEY, *Adm'r.*

80 *Assignment of Error, &c.*

Filed Jan'y 3, 1891.

Supreme Court of the United States.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and JOHN CASSELS, Plaintiffs in Error,
vs.
FRANKLIN H. MACKEY, Administrator, &c.

Assignment of error and prayer for reversal.

And now comes the said Baltimore and Potomac Railroad Company and John Cassels, plaintiffs in the writ of error herein, and pray that the judgment of the supreme court of the District of Columbia against them and in favor of the above-named Franklin H. Mackey, administrator, defendant in error, may be reversed because of the following errors committed by the trial court, to wit:

First. Because the trial court, on the motion made by the defendants on the whole evidence, refused to direct a verdict in favor of the defendant.

Second. By instructing the jury, at the request of the plaintiff, as follows:

81 "The jury are instructed that the employees of a railroad corporation have a right to expect that the corporation will, as far as possible, provide for their protection in moving its trains sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes. If, therefore, the jury believe from the testimony that the brake set by the brakeman, Teiling, was defective at the time of the accident, and that by the exercise of reasonable care and caution the defendant could have known said brake to be defective, then it is liable, and their verdict must be for the plaintiff, provided they believe from the testimony that the accident was caused by reason of said defective brake."

Third. By instructing the jury, on the request of the plaintiff, as follows:

"The jury are instructed that if they believe from the evidence the brakes set by Brakeman Teiling, as detailed in the evidence, would, if then in good order, have prevented the cars from
82 moving, or at least would have tended to retard such movement so as to have given sufficient time to notify Brown of his danger and to have enabled him to escape, then, if the jury believe from the evidence that the brake was not in good order at the time of the accident, and, further, that the defendant by the exercise of reasonable care could have known of its defective condition, their verdict must be for the plaintiff."

Fourth. By instructing the jury, at the request of the plaintiff, as follows:

"I have thought best to advise you, as the law of this case, that you should address yourself at once to but one question, and the whole case will turn upon that question, and that is so far as the predicate of the plaintiff is concerned, and to say nothing about a qualification to which I shall call your attention in a few moments. That is this: Was the defendant's car or that car upon which this brakeman, Mr. Teiling, set that brake on that night—was
83 that brake in a proper, reasonable condition? If it was not in a proper, reasonable condition, did the cars roll back in consequence of that infirmity? Was the accident traceable to that? I will say here, gentlemen, that if you should be satisfied from the evidence in this case that this brake was in a reasonably good condition, in good ordinary repair, and there was nothing wrong about it, then the plaintiff cannot recover, because that would end the case; but if you should reach the conclusion that it was not in proper condition, that it was defective, then you will inquire further: If it had been in proper condition, would it have held the train? It is not disputed that it did not hold the train or the train was not held, and the cars rolled back and the accident took place. Now, would it have held the train had it been a proper brake, in proper condition?"

"If you should determine that the brake was in an im-
84 perfect condition, such a condition as I have described, and if it had been in a proper condition the train would not have rolled back as it did, and if you shall find that the deceased was

not guilty of contributory negligence, then the plaintiff could recover. In this regard I read to you the plaintiff's third and fifth requests for instructions."

(Here the court read the two prayers set out in the 2d and 3d assignments of error.)

"So you see, gentlemen of the jury, the only question, so far as the negligence of the defendant is concerned, is, Was the brake defective, out of order, not in reasonable repair, not reasonable for the occasion; and, if not, was such fact the cause of the accident, or did it materially or directly contribute to it? If so, the plaintiff will be entitled to recover, provided the other conditions exist."

Fifth. By instructing the jury as follows:

85 "Now, manifestly, you cannot estimate in dollars and cents exactly what the damages are in a case of this kind, if there be any at all; that is not possible; but you may and should take into consideration the age of the man, his health and strength, his capacity to earn money as you discover it from the evidence; his family, who they are and what they consist of; and then, gentlemen, from all the facts and all the circumstances, make up your mind how much this family, if anything, probably lose by his death, and that would be how much had this family a reasonable expectation of receiving, how much had they a reasonable expectation of receiving while he lived, if he had not been killed."

Sixth. By refusing to instruct the jury as to the burden of proof, as requested by the defendant's counsel, and in denying the requests for instructions by the defendant's counsel on that subject as follows:

a. "Upon the evidence in this cause the burden of proof is 86 upon the plaintiff to show to the jury by satisfactory evidence that his intestate did not by his own want of ordinary care contribute to bring about the accident which resulted in his own death."

b. "Upon the pleadings in this cause the burden of proof is upon the plaintiff to show to the jury by satisfactory evidence that his intestate did not by his own want of ordinary care contribute to bring about the accident which resulted in his own death."

c. "Upon the pleadings and evidence in this cause the burden of proof is upon the plaintiff to show to the jury by satisfactory evidence that his intestate (Brown) did not by his own want of ordinary care contribute to bring about the accident which resulted in his own death."

Seventh. By refusing to grant the following instruction asked for by the defendant's counsel, to wit:

"Unless the jury shall be satisfied from the evidence that a defect in the brake which was set by Teiling on the stock car 87 just before the accident was the sole cause of the injury to Robert A. Brown, the plaintiff's intestate, and that said brake was in such defective condition at the time the said stock car was by the defendant put into its train, the plaintiff cannot recover, and the burden of proof is upon the plaintiff to show by evidence satisfactory to the jury that said brake was in such defective con-

dition before said car was by the defendant put into the said train."

Eighth. By refusing to grant the following instruction requested by the defendant's counsel, to wit:

"If the jury shall find from the evidence that the injury to Robert A. Brown resulted solely in consequence of some defect in the brake set by Teiling on the open or stock car next to the engine and tender, and that the said stock car was not the property of the defendant but belonged to another railroad company, had been on the same evening and a short time prior to the accident brought to the defendant's yard in Washington in a freight train, with
88 the brake in such defective condition, then the fact (if the jury shall so find the fact) that such injuries did."

Ninth. By excluding from the consideration of the jury as evidence the following rules and regulations of the defendant company for the protection of car-inspectors, to wit:

"A blue flag by day and a blue light by night, placed on the end of a car, denotes that car-inspectors are at work under the car or train, the car or motive power. They are under the direction of yard or station masters."

"They must inspect all cars passing their stations, especially the running gear and brake fixtures, and make such repairs as may be required. They will send to the shop all cars not fit for service."

"They must see that freight cars are not loaded beyond their safe capacity, and that the lading is properly distributed and does not exceed the authorized height or width."

89 "When inspecting or making repairs to cars they must protect themselves by placing a blue signal on each end of the car or train, as per rule No. 34."

Tenth. The general term of the supreme court of the District of Columbia also erred herein by rendering the judgment—which it did in this cause—against John Cassels, who was the surety for the appeal from the judgment of the circuit court to the general term.

ENOCH TOTTEN,
Attorney for Plaintiffs in Error.

90 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 6th day of January, 1891.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By H. W. HODGES,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 6th day of Jan'y, 1891.

E. F. BINGHAM,
Chief Justice. [SEAL.]

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 6th day of January, 1891.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By H. W. HODGES,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Case No. 14,474. Dist. of Columbia supreme court. No. 84. The Baltimore & Potomac Railroad Company and John Cassels, plaintiffs in error, *vs.* Franklin H. Mackey, administrator of the estate of Robert A. Brown. Filed February 5, 1891.

Office Supreme Court, U. S.
FILED.
OCT 6 1894
JAMES H. McKENNEY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE BALTIMORE & POTOMAC RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
FRANKLIN H. MACKEY, ADM'R.
No. 84.

Brief for Plaintiff in Error.

ENOCH TOTTEN,
for the Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE BALTIMORE & POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* FRANKLIN H. MACKEY, ADM'R.	*No.* 84.

Brief for Plaintiff in Error.

This action was instituted under the provisions of the act of Congress of February 17, 1885 (23 Stat. 307), to recover damages because of the death of Robert A. Brown, an inspector and repairer of cars, which resulted (March 17, 1887) from injuries to him caused by his having been caught between two freight cars on a side-track, in the city of Washington.

STATEMENT OF FACTS.

Robert A. Brown, at the time of his death, was in the employment of the defendant as a car inspector and repairer.

As such it was his business to examine or cause to be examined all cars arriving in this city, and to see that the brakes and everything else about the cars were in good order; if he found anything connected with the machinery or construction of any car in bad order, it was his duty to repair it or have it repaired by his men, or cause it to be sent to the shop for such repairs (11, 25, 30). The defendant had two yards—the "Jersey yard" and the "Maryland-avenue yard." The deceased, at the time of his death, was the foreman of the car inspectors at night in the Jersey yard, and had been employed by the company for five years or more (8, 21). He was a skilled man in his business in whom his superiors had confidence (22). He was about thirty-four years of age at the date of his death, and was intellectually "bright." He was paid at the rate of $45.00 per month. The defendant had in its service at the time, in the city of Washington, six or eight freight-car inspectors, and the deceased, Robert A. Brown, was the "leader" or "foreman" of such car inspectors at night (15, 16).

At the time of the accident and for many years prior thereto, regulations or rules in relation to the protection of servants of the company while engaged in repairing cars were in force, one of which was admitted in evidence. It was in the following words, to wit:

"A blue flag by day, and a blue light by night, placed on the end of a car denotes that car inspectors are at work under the car or train. The car or train thus protected must not be coupled to or moved until the blue signal is removed by the car inspector" (26).

The deceased had been thoroughly instructed in reference to these rules, and the above-quoted rule was supplied for the use of the office occupied by him (21, 22),

and he understood all of them perfectly. He was fully cautioned as to the necessity of guarding himself and his subordinates according to this rule when at work about a train. The chief car inspector of the defendant testified on this subject as follows:

"What did you do with reference to Mr. Brown, touching these rules which I have shown you?

"A. As I told you——

"Q. Tell the jury what you did with reference to Mr. Brown.

"A. I told Mr. Brown that he must have a blue light at night or a blue flag in the daytime before going under any car to repair it, and under no circumstances to do any work on any cars without that protection. That was their protection." (25.)

The accident occurred March 17, 1887, about nine (9) o'clock at night. The night was a stormy one; "a fearful bad night," the plaintiff's witness said (10, 33). The wind was blowing "very hard" and snow was falling and snow was on the ground, and it was very dark. The deceased was on duty that night, at the place of the accident, with his uncle William Brown, who also was a car inspector employed by the defendant, and a subordinate under the deceased. They had the blue lamps required by the regulation for the purpose of protecting themselves while at work about the cars, according to the rule, but on that occasion they had neglected to fill them with oil, and for that reason, probably, the lamps were not displayed (10).

On the night in question a train called the "fast freight" arrived at the "Jersey yard" from the east about 20 minutes after 10 o'clock P. M., and was placed on one of the side-tracks, and thereupon the crew with the switching engine began to break it up and distribute the

cars (28). During this work, the conductor of the switching engine was informed by the deceased that they had a broken "bull-nose" in the train and was asked to pull the cars apart, which he agreed to do. The conductor thereupon went to the place and connected the engine with the car at the end of the remaining portion of this freight train, and having caused the proper cars to be cut loose he pulled them from the car having the defect mentioned, to a distance of between 35 and 40 feet, and stopped; three cars were pulled away. When the conductor ordered those cars to be cut loose, the deceased was standing at the point where the cut was made, and said to the conductor: "Take them three cars up and shift them, and by that time I will have this bull-nose put on;" but the conductor said to deceased: "No; I don't want to shift those cars. I have got out all the southern cars * * * and I am going to leave them standing here" (30, 31). After the coupling pin was taken out, the conductor gave the signal to pull ahead and then went up towards the engine (28, 29). Brown, the deceased, called and said, "That will do," and then the conductor signalled the engineman to stop by swinging his lamp, and the engine stopped. Just then the engineer called for the conductor and the latter went to the engineer, who said he had not sufficient water to do any more switching. The conductor told him he had no more switching to do, but asked him to take a load of stock to 6th street, and then to get water there, and the engineer said he would try it. The conductor then ordered the brakeman, the witness Teiling, to go up and "set this brake," the end brake on the car nearest to the engine, and then to cut loose the cars from the engine. Teiling got up on this car and set the brake, and set it as tight as he could; and he was a strong, heavy man. The brake seemed to take hold. He

then went upon the tank or tender of the engine, signalled the engineer to slack up, which was done, and then he pulled the pin, thus disconnecting the cars from the engine. The three cars immediately began to move down the grade, and, notwithstanding loud calls to Brown to "look out!" and the ringing of the engine bell, the cars struck Brown and killed him (19, 12). These cars which had been cut from the others to give opportunity to repair the broken bull-nose were all loaded; the one nearest the engine was an open stock car boarded up, and was loaded with coal-oil; the others were loaded with coal. The grade was heavy, the wind was blowing, snow was falling and snow was on the ground, and the track must have been wet and slippery.

It was improperly made a controlling question in the trial of the case, whether or not the brake on the car next the engine, which the brakeman set, was out of order. The brake was apparently in good condition. The car was a foreign car and belonged to another company, and had been in the yard only a few minutes (15). There was nothing about the appearance of the brake to attract the attention of an inspector examining a car in the ordinary way. It worked so well and seemed to perform its functions so efficiently—"to take hold" so firmly—that the experienced brakeman who set it thought it was "a good brake." Teiling, who was a strong, heavy man (29), said it evidently took hold and that he "thought it was a good brake" (13). Phillips says it "seemed to take hold," and the engineman (Smith) says the brakeman put on this brake "as hard as he could;" that he noticed he "was putting it down as hard as he could." After the deceased had been hurt, the engine was run down and was connected with the run-away cars, but the engine was unable to pull them away, because the brake was still set; and it

could not move them until the brake had been relieved (20, 29).

The plaintiff, in order to prove that the accident was chargeable to a broken or disordered brake, called a witness, Mr. White, who had been a car inspector for the defendant. He testified that he, with Downs, *on the first or second day after the accident*, went to examine the alleged defective brake on the car loaded with coal-oil, and that they found a car which they examined, and found a defective brake upon it, but he did not know whether this brake was the one on the car connected with the accident. All he knew about it was that "he was told that that car was the cause of the accident." Downs was called by the defendant (23). He said he went with White to examine the alleged defective brake, but he thought it was either *two or three days after the accident*; he says they found a car with a brake which was not a "first-class brake." The witness White also testified that the brake which he and Downs examined the second or third day after the accident was defective; they found, he said, "that the bottom connection was too short, and that if it had been a long connection, or connected all along, it would have been a pretty sufficient brake." Downs says of the same brake that "it was not a number-one brake," * * * "not a first-class brake," and the trouble with it was "that the connections did not work as they ought to have worked." The car so examined was in the Maryland-avenue yard, at the corner of Ninth street and Maryland avenue. The accident happened in the "Jersey yard," and the only witness inquired of as to this (White) said he did not know how this car was brought to Maryland avenue yard (23, 15). This car was not a car belonging to the defendant; it was the property of the Pennsylvania Railroad Company (15). It was labelled with chalk on the

end and on both sides "defective brake;" these chalk marks "looked pretty pale, like they had been on there for some time." It is the business of a car inspector to so mark a car on which there is a defective brake unless he shall repair it. The witness (White) did not know when these chalk marks were put on the car, but he had "heard" that they were put there in the Jersey yard.

One good brake is sufficient to hold eight cars (13) and was sufficient to hold four cars at that place. The evidence is clear that when the engineer, in obedience to the signal of Teiling, the brakeman, relaxed the coupling between the tender and the first car in order to cut loose the engine from the cars, no bumping took place which could have started the cars down the grade. The engineer did not even reverse the engine; he says: "I just let off the air" (19). It seems to be a fair inference that these three cars were started down the grade by force of the gale which was blowing, and that the brake did not hold them because of the dampness of the track at the time.

After the cars had been pulled away from the car upon which the repairs were to be made, the deceased and his assistant went into the opening and began work "at once;" they went in and went to work within a "half minute" after the cars were cut loose and as soon as the engineer stopped (11, 32).

Neither the engineer, the conductor, nor the brakeman knew or supposed that Brown had begun to work on the car. The conductor of the switching engine did not know that the deceased had begun or that he intended to begin work on the broken bull-nose at once. Having told the deceased that he intended to leave the three cars standing there, he supposed that he (Brown) and his assistant would wait until he had gotten away with his engine, and that they would then hang out the *blue lights* for their

own protection; if the deceased had displayed his *blue lights* on the car upon which he was engaged before entering the place of danger, as it was his duty to do, the conductor would have known he was in this place, and would have gone to him and notified him to protect himself. It was a place of great danger. There were eight sidings in the Jersey yard, and they held 150 or 175 cars; at least 100 cars were on them that night, and there was another switching engine at work near the other end of this line of cars. When asked if he would not have gone and left those cars in that place in any event, the conductor said:

"Not if I had hold of cars with an engine and they had a blue light on those cars and I was going to cut loose from them. That means that they were in there at work, and I would have gone down there and notified them I was going to cut loose the engine and go away" (31).

This conductor, being further examined on this subject, said:

"Q. If you had seen a blue light there you say you would have gone back again. Did you intend to leave those cars stand just where you stopped them?

"A. Yes, sir.

"Q. What was in your mind when you observed there was no blue light; that they were or were not under the car?

"A. From my statement I told him I was going to leave those cars standing there, and of course that meant to men of sense that they had no right to go in there until I got away, and then to protect themselves with a blue light. An engine coming up against those cars at the other end would have crushed him to death.

"Q. You are guided under those circumstances entirely by a blue light?

"*A. When there is a blue light on a car I never touch a car until they take it down.*"

The fact that the engineer told the deceased that he intended to leave those cars standing there is undisputed and indisputable. There was no blue light displayed by the deceased. The conductor further says on this subject:

"Q. In working at such a place as that, was it usual and customary to put a blue light on the ends of the car? Suppose he was at work on this broken bull-nose, would he have hung a light on the stock car after your engine went away?

"A. Yes, sir.

"Q. That is the place where the blue light would be?

"A. Yes, sir.

"Q. Because somebody would run into it and jar it down against him?

"A. Just as likely as not; yes, sir.

"*Q. You expected when you went away that he would put his blue light on there before he went to work?*

"*A. It was their business to do it, and my business not to run against them until they took it down.*"

Assignment of Errors.

The trial court erred as follows:

1. In refusing to direct a verdict in favor of the defendant at the close of all the evidence, as requested by the counsel for the defendant.

2. By granting the two prayers asked for (33, 34) by the counsel for the plaintiff, each of which wholly ignores the question of contributory negligence, and one of them imposes a higher degree of care than the law requires.

3. By trying the cause on the theory that the accident was attributable to a defective brake, contrary to the case

made by the declaration—that is to say, that the accident was caused by the negligence of the defendant's servants in allowing a train to "run into" the train in which the deceased was working.

4. By refusing to give the two instructions asked for by counsel for the defendant in respect to the degree of care required as to foreign cars, which prayers are set out in the 11th and 12th exceptions (36).

5. By instructing the jury as set forth in the 13th and 15th exceptions (37, 38), which instructions hold that the defendant railroad company was absolutely bound to see that the brakes were in good order in any event and on any occasion, instead of holding that it was responsible only for the exercise of reasonable diligence in that regard.

6. By instructing the jury that in estimating damages they might take into consideration the "strength" of the deceased, and his family—"who they are and what they consist of," and that they might then inquire how much they had a reasonable expectation of receiving during his life had he not been killed.

7. The judgment entered in the general term of the court below is wrong (40). That judgment affirms the judgment of the trial court, and then proceeds to enter up judgment against the defendant "as in said declaration claimed." A reference to the declaration shows that the sum of $10,000 is claimed; the verdict was for $8,000.

Points and Authorities.

It was contended by way of defence in this cause (1) that the defendant was not guilty of negligence; (2) that the accident resulted from the carelessness of the plaintiff's intestate; (3) that the question as to whether or not

the accident was caused by a defective brake was not available under the pleadings; (4) that if it was, then, it being the duty of the deceased, as inspector, to have discovered and repaired this brake, and, having failed to do so, he was negligent; and (5) if the accident resulted because of the negligence of the trainmen engaged in switching the cars, they were the fellow-servants of the deceased, and the company is not liable.

I.

The defendant was not guilty of any negligence. If the brake was defective, which is not conceded, it was not the fault of the defendant. The defendant had employed a skilled and reliable man to inspect all cars and discover all defects, and this servant was on the ground at the proper time and actually inspected the train. So far as this case is concerned, this is all the law required the defendant to do.

A corporation must necessarily act through its agents. It was the duty of the plaintiff in error to employ a skilled man, or a man reputed to be skilful in the business, to inspect and repair its cars. When it had done this it had performed its whole duty as master.

Shearman and R. on Neg., §§ 78–84.

Wharton on Neg., §§ 175, 182, 184, 186 to 188, 818.

There was no attempt to prove that any of the trainmen in charge of the switching engine were guilty of any negligence. On the contrary, the evidence shows that they acted with great prudence. Even if there was a defective brake, and that fact could be relied upon as a ground of recovery, it cannot be said that the trainmen were negligent. In fact, counsel for the plaintiff relied solely upon

the theory that the defective brake caused the calamity, and the court also proceeded upon it wholly.

II.

The deceased was guilty of negligence.

The motion made by the counsel for the defendant at the close of the whole testimony should have been granted and a verdict directed in favor of the defendant, for the reason that the evidence plainly showed negligence on the part of the deceased.

The deceased himself had been directing the movements of the cars which afterwards struck him, and told the conductor of the switching engine to pull them away, and when this was done he immediately went between the two trains and proceeded to work on the stationary portion of the train with his back towards the cars which had been moved. The night was very dark, a snow-storm was raging with a violent wind blowing, and the three cars were on a steep grade. He knew that the cars were to be left where they had been stopped by his order, and that they were heavily laden. He must have known that there was great danger in the position in which he had placed himself. He neglected to display his blue lights; this was gross carelessness and a plain violation of the rules and regulations of the company and of his special orders. If he had displayed a blue light, as he was bound to do, before beginning his work on the train, no injury could have occurred to him. The conductor undoubtedly supposed that the deceased would wait until the engineer had gotten away with his engine and that he would then hang out his lights for his own protection. If he had displayed them at once, the conductor would have known he was at work and would have been guided in his movements by

the rules and regulations. The deceased was thus doubly guilty of negligence.

He carelessly placed himself in a place of danger, and the consequences cannot be charged to the defendant.

Southern Pa. Co. v. *Seley*, 152 U. S. 145.

Elliott v. *Chi., Milw., &c., Railway Co.*, 150 U. S. 245.

Tuttle v. *R.R. Co.*, 122 U. S. 191.

Houston v. *R.R. Co.*, 95 U. S. 697.

O'Rorke v. *M. R.R. Co.*, 22 Fed. Rep. 187.

St. Louis, &c., R.R. Co. v. *Schumacher*, 152 U. S. 77.

In the next place, if negligence could ordinarily be charged against the defendant because of the brake being out of order, it must in this case be charged upon the plaintiff's intestate, because he was employed and it was his duty to discover the disordered condition of the brake and to repair it, and his failure to do so was his negligence, and the plaintiff cannot recover.

When the act of negligence which causes the accident was the act of the party injured, no recovery can be had.

Dewey v. *Chi. & N. W. R. W. Co.*, 31 Iowa, 373.

Barber v. *R.R. Co.*, 5 O. St. 541.

It seems to be the law that if some other employee of the defendant had been injured by reason of this car inspector's neglect, the company would have been liable on the ground that this person was the representative of the master appointed to perform the master's duty, and not a fellow-servant.

Herbert v. *R.R. Co.*, 116 U. S. 642.

Tierney v. *R.R. Co.*, 33 Minn. 311.

It must be conceded that a corporation can only perform its duties by means of agents, and when it has em-

ployed a skilful man for a particular duty, it has done all the law requires; and it is fully settled by authority that this is all that a railroad company can be required to do in cases where loaded cars of another company are transferred to its tracks, whatever the rule may be as to its own cars.

Mackin v. *R.R. Co.*, 135 Mass. 201.

There is another aspect of this case which was disregarded by the court on the trial. The plaintiff's intestate was employed, and it was his business, to deal with broken and disordered cars. He must, therefore, be held to have knowledge of the broken brake, whether he actually knew its condition or not. It appears that he did actually make at least a partial inspection, as he discovered the broken bull-nose, which he undertook to repair. He should have discovered the broken brake, if it was broken. The car with the alleged broken brake was within two car-lengths of the broken bull-nose. Although it is ordinarily the duty of railroad companies to furnish reasonably safe appliances, cars, and machinery for their employees, and in default thereof they are liable for injuries resulting from such default, yet this rule of law does not apply to cases where employees and servants of railroad companies are engaged in repairing damaged cars. By his employment to handle damaged cars the deceased assumed the risk incident to the enhanced danger of this service, and the law presumes that he was paid for it.

Yeaton v. *R.R.*, 135 Mass. 418.

Tuttle v. *R.R.*, 122 U. S. 189.

2 Rorer on Railroads, 1215.

Chi. & N. W. R.R. Co. v. *Ward*, 61 Ill. 130.

Flannagan v. *Chi. & N. W. R'y Co.*, 45 Wis. 98.

1 S. & R. on Neg., sec. 185.

Flannagan v. *R.R. Co.*, 50 Wis. 462 (2d appeal).

In the next place, if this accident was caused by the carelessness of the trainmen in charge of the work of switching cars in the yard, then the plaintiff cannot recover, because such trainmen were *fellow-servants* of the deceased. This has been settled recently by this court in the case of R.R. Co. *v.* Hambly, 154 U. S. 349. See also—

Randall *v.* B. & O. R.R., 109 U. S. 478.
B. & O. R.R. *v.* Baugh, 149 U. S. 368.
Tuttle *v.* R.R. Co., 122 U. S. 189.
O'Rorke *v.* R.R. Co., 22 Fed. Rep. 189.
Quebec S.S. Co. *v.* Merchant, 133 U. S. 375.
Rohback *v.* R.R. Co., 43 Mo. 187.
Wood on M. & S., p. 844 *et seq.*, and notes.
Bunt *v.* Sierra Co., 138 U. S. 483.
D. C. *v.* McElligott, 117 U. S. 621.
Murphy *v.* N. Y. Cent. R.R. Co., 11 Daly, 122.
1 S. & R. on Neg., sec. 184 *et seq.*, and note.
Baltimore Elevator Co. *v.* Neil, 65 Md. 438.
Besel *v.* N. Y. C. & H. R. R.R. Co., 70 N. Y. 171.
Smith *v.* Potter, 46 Mich. 258.
C. & X. R.R. *v.* Webb, 12 Ohio St. 475.
Mackin *v.* R.R. Co., 135 Mass. 201.

III.

At the close of the evidence the plaintiff's counsel requested two instructions, which were objected to by the defendant's counsel; they were granted by the court. They constitute the errors claimed in the 5th and 6th bills of exception (33, 34).

The criticism on these declarations of the law of the case is (1) that it is not for the plaintiff to object (he being in the place of the deceased in this suit), that the *defendant* failed to exercise reasonable care in keeping

the brake in repair. It employed Brown himself, who was a proper man for that duty, to examine this brake and to repair it if it was in bad order. Having employed a competent man for that purpose, it did its whole duty. If there was negligence as to this brake the negligence was the negligence of Brown. (2) Each of these instructions wholly ignores the important question of contributory negligence.

In addition to these errors the attention of the court is invited to another serious complaint. The first of these two prayers starts out as follows;

"The jury are instructed that the employees of a railroad corporation have a right to expect that the corporation will, *as far as possible*, provide for their protection in moving trains *sufficient machinery in good order and condition*, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes." This language imposed a degree of care on the railroad in selecting and keeping in order its appliances and machinery unknown to the law. This instruction relates to two subjects: first, the duty of *providing* machinery in good order and condition, and, second, to *using*, in its trains, cars having defective brakes. As to the first, the court instructed the jury that the obligation imposed by law on the corporation was to provide machinery in as good order and condition as was "*possible*." This was error; this is not the degree of care and diligence required by law; all that is required by the strictest rule is that the master shall exercise reasonable care and diligence in this matter. To provide the best *possible* appliances and to keep them in the best *possible* order has never been required, and, indeed, could not be. How could a railroad company prove that its officers had provided the *best possible machinery?*

The attention of the court is invited to the very ingenious explanation of this error in the able opinion in the case in the general term (46); that opinion transfers the words "as far as possible" into another part of the prayer, so as to make them operate upon and qualify entirely different requirements; these words require the defendant to supply, as far as is *possible*, "sufficient" machinery and in as "good order and condition" as *possible*. The proposed change in the collocation makes these words serve an entirely different purpose. Even if the transposition of words were made as the court below says it should be, would the error be remedied? That court's arrangement of the words would require the master to "provide * * * sufficient machinery in good condition (as far as possible)"; this is obnoxious to the same objection. The law does not require the master to provide machinery or to keep its machinery in good condition *as far as possible*; it requires, only, that he shall provide machinery in reasonably good condition,—not in as good condition *as possible*. The second proposed arrangement by that court, of the objectionable words is also subject to grave objection; the defendant was bound to exercise reasonable care and caution in every event—not "as far as possible."

IV.

The plaintiff having failed to prove negligence on the part of the defendant's other servants, he could not, under the pleadings, recover on the ground that the accident was caused by a defective brake. Mention of a defective brake will not be found in the declaration.

It was error to depart from the theory of the case set out in the declaration. The case was made to turn, on the

trial, on the question as to whether or not the brake used to hold the three detached cars was defective or in bad order. This was not the case made by the plaintiff in his declaration; the pleadings exclude that view of the case. The declaration in the first count states the cause of action thus:

"The said Robert A. Brown, being then in the employ of the defendant as a car inspector, was, to wit, on the day and date aforesaid, *at work*, as such employee, *in the repairing of one of the defendant's cars*, and while so at work, by reason of the negligence and default of the defendant, its *servants, agents, and employees* (which said servants, agents, and employees were not employed by the defendant in the same common work or employment with said intestate, but were employed and were then at work in different departments of duty from said intestate), the said *car was run into* by another of the defendant's *cars*, whereby the plaintiff's intestate, by the collision of said cars, was so crushed and injured that death immediately followed."

The second count is substantially the same. This language excludes the idea that the injury occurred in consequence of defective appliances; to say that the deceased was engaged in "repairing" a car, and that this car was "run into" by another car in consequence of the carelessness or negligence of other servants of the defendant, cannot admit of a trial on the theory that the accident was the result of defective machinery. But the trial judge told the jury that "the only question, so far as the negligence of the defendant is concerned, is, was the brake defective," &c.

But, even if this question was properly before the court, there was no evidence in the case which warranted the trial justice in submitting it to the jury. The only posi-

tive evidence tending to establish the alleged fact that the brake was out of order was the circumstance that the cars ran down the hill when cut loose from the engine. But the same evidence which showed this fact showed the other fact—that the brake held the cars so firmly that the engine could not move them until its hold had been released. The evidence of White and Downs proved nothing. They did not identify the car; they had no means of identifying the car, and did not know whether the car examined by them in the Maryland-avenue yard was the car which caused the accident or not. They might have found fifty cars in this yard with defective brakes, but this fact would have proven nothing against the brake set by Teiling. We are really without any testimony whatever to show that the car examined by White and Downs in the Maryland-avenue yard two or three days after the accident actually was the car which caused the injury. But, giving to their testimony direct application to this car, there was not enough in it to support the instructions of the court. White says that in making the inspection of the car he set the brake or "put the brake down," and then upon examination "found that the bottom connection was too short;" but he added that if it had been "a long connection," or, "*connected all along*, it would have been a pretty *sufficient brake*." This does not tend to show a brake out of order, but only that in the witness' opinion the brake he examined was not a *good kind of brake*. Downs says that the brake was not a "first-rate brake;" that it was "not connected properly," but that this "was not a recent thing." This only tends to prove that the brake was not as efficient as some other kind of brake, if it can be taken at all as proof in the case.

Putting out of sight for the time the fact that the deceased was the person employed to discover and repair

broken brakes, it will be observed that the court ignored the law as applicable to *foreign* cars. The evidence that this car with the alleged defective brake was a foreign car was very slight; but what there was, if any, went to the jury.

A different responsibility is connected with such a car. A railroad company receiving a loaded car from another company is entitled to presume that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when received.

Ballou v. *R.R. Co.*, 54 Wis. 267.
See also Smithson v. *R.R. Co.*, 45 Mich. 212.
Smith v. *Patten*, 46 Mich. 258.
Baldwin v. *R.R. Co.*, 50 Iowa, 680.
Davis v. *R.R. Co.*, 20 Mich. 105.
Mackin v. *R.R. Co.*, 135 Mass. 201.

The instruction (No. 8) asked for on behalf of the defendant (36), based upon the plaintiff's proof that the car which inflicted the injury was a *foreign car*, should have been granted.

Furthermore, there was no evidence to show that the defendant had notice, or that it ought to have known, that the brake was out of order, even if that was the fact, and the court erred in ignoring the question of knowledge in the defendant as to the alleged defective brake.

The court, on the trial, having made the case turn on the question whether the brake set by Teiling was or was not out of order, it was essential to show knowledge in the defendant, or that knowledge might have been obtained by the use of reasonable diligence, of the defect in

the brake which caused the injury. Without this there can be no recovery.

Allen v. *New Gas Co.*, 1 Exch. Div. L. R. 251.
Hightower v. *R.R. Co.*, 92 Ill. 139.
Platt v. *R.R. Co.*, 89 Ill. 141.
Dewey v. *R.R. Co.*, 31 Iowa, 374.
Tierney v. *R.R. Co.*, 33 Minn. 311.
Barber v. *R.R. Co.*, 5 Ohio St. 564.
2 Rorer on Railroads, p. 1200 and 1201 (note).
Painton v. *N. C. R.R. Co.*, 83 N. Y. 7.
DeGraff v. *R.R. Co.*, 76 N. Y. 125.

V.

The trial judge, in the oral instructions in reference to the duty of the corporation as to keeping brakes in good order, utterly ignored the distinction between *warranting* the good order and fitness of the brake for the service at all times, and exercising reasonable care and diligence in keeping it in good order.

It will be observed that the court impressed it upon the minds of the jury that the defendant was bound to see to it that this brake was in good working condition and sufficient to hold those three cars at the time. This was holding the defendant to a higher degree of care than the law requires. The rule is thus stated by this court (W. & G. R.R. Co. *v.* McDade, 135 U. S. 570): "Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the

safety of those in their service by providing them with machinery reasonably safe and suitable for the use of the latter."

The court told the jury that if they should find that the brake in question "was not in proper condition, that it was defective," then it would become their duty to "inquire, further, if it had been in proper condition, would it have held the train?" Now, it was not material whether it would or would not have held the train under the extraordinary circumstances existing at that time. The only duty the defendant had to perform (had this been one of its own cars) was to see that a brake reasonably adapted to such a car was provided, and that it was in reasonably good repair. But the trial judge was not content to leave the law in that condition even; he added another obligation to the duties of the defendant. He left it to the jury to determine this question: "Would it have held the train had it been a *proper brake*, in proper condition?" The jury was here told to inquire, in the first place, whether the brake was the proper kind of a brake, and, in the second place, whether it was in good repair or condition. Yet there was no evidence submitted to show that the brake was not the kind usually put on such cars, or that there was any better kind of brake. They were invited to conjecture whether or not there might not have been a better brake *made* or *purchased* by the defendant. It may be remarked here that it does not usually require much time for a jury to decide such a question in a case like this.

The court, after having read the two prayers (5 and 6) allowed to the plaintiff, proceeded further to elucidate his meaning on the subject of the degree of care required of the defendant as respects brakes on cars. The jury was instructed that if they should find that the brake was "defective," or "not reasonable *for the occasion*," then the

defendant was liable, and the plaintiff was entitled to recover. This was a declaration to the effect that the defendant was bound to provide brakes which would hold cars under any circumstances and on any occasion; that brakes must be provided by a railroad company which will hold cars against the most furious and unprecedented hurricanes. Here three cars were standing on a heavy grade, on a wet track, with a heavy wind blowing them down the grade. This was an extraordinary situation of things, and one which probably never occurred before, and might never occur again. The court in so instructing the jury committed an error which was to the disadvantage of the defendant. The law does not require of the defendant more than reasonable diligence. If the brake was one which was in general use, or reasonably suitable for the purpose—such a brake as ordinarily prudent men would have used for similar service—it was sufficient. The defendant was not bound by any rule of law to provide brakes which would be absolutely sufficient and effective for every occasion which might present itself, or for all possible circumstances which might arise. But this is what the court held in telling the jury that the brake must be found to have been sufficient to hold *those three cars* at that time and in that situation, and the general term of the court declares that the law was properly interpreted and declared. It is submitted that it was not.

In this connection it is proper to invite the attention of this court to the criticism by the general term in reference to the error claimed to be shown in the 13th bill of exceptions. That court says, in the opinion (50), that the exception "is taken to the charge of the court, reaching over nearly two printed pages, without specifying which portion of the language used was considered incorrect." In

safety of those in their service by providing them with machinery reasonably safe and suitable for the use of the latter."

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response to this, it is suggested that the exception is not fairly open to this criticism. The objection is not to the *language* of the judge, but to the rule of law as announced by the court. An examination of the exception will show that the whole of it relates to but one subject-matter; if any of it had been omitted, the trial judge might fairly have complained. The preliminary remarks of the judge quoted in this exception were merely inducement to the declaration of the rule of law. If such inducement was "correct," does it follow that the exception must be thrown out and disregarded? Even this much-abused rule does not require such action. The court below says that many of the "statements" of the judge must be admitted to be correct. Perhaps so, but there cannot be found a correct rule of law there.

I have often suspected that this somewhat mythical rule, alludéd to by the court below, might be obliterated from the books without detriment to the administration of justice. But, be that as it may, it can have no application to this exception.

Before leaving this able opinion of the general term, I desire to point to the fact that it wholly leaves out of view, in discussing the various points, the very potent fact that the deceased foreman was employed by the defendant, because of his skill and experience, to discover and repair this very brake; and if the defendant can be charged with negligence, it is solely because he imperfectly performed the duty of inspecting this very train and this very car; if he had performed his duty well, he would have found the imperfection in the brake and would have cured it. Some other employee, being injured, might charge negligence against the company, but the deceased could not, if living, nor can his legal representative in this action.

VI.

The trial justice also erred by instructing the jury that they might consider the "strength" of the deceased, in reference to his capacity to earn money; there was nothing in the evidence to show whether he was a strong man or otherwise.

The court also erred in the oral instructions to the jury on the subject of damages. The learned judge told the jury that they should take into consideration in estimating damages "his family—who they were and what they consist of." This instruction directed the jury to consider, first, who were the family, or, which is the same thing, what was the condition in life of this family, and, second, of what age and sex were the children.

The statute under the provisions of which this action is made maintainable, in providing for the ascertainment of damages, directs that—

> "Such damages shall be assessed, with reference to the the injury resulting from such act, neglect, or default, causing such death, to the widow and next of kin of such deceased person."
>
> 23 Stat. 307.

Or, in other words, the amount of damages shall be in proportion to the extent of the pecuniary loss to the widow and children resulting from the neglect and accruing therefrom to them. It is wholly immaterial whether the deceased left one child or ten children. The capacity of the deceased to earn money was accurately fixed on the trial to be $45.00 per month. This enabled the jury to estimate the probable amount of his earnings had he lived to the ordinary length of human life. They ought not to go beyond this; the loss is the *pecuniary* loss. If,

instead of earning $45.00 per month, he had been able to earn $100.00 per month, the pecuniary loss to the widow and children would have been greater.

Under this statute the pecuniary loss or "injury" to the widow and children of a clegyman receiving a salary of $25,000 caused by his death would be much greater than the injury to the widow and children of a hod-carrier who could earn only $1.50 per day. The loss in each case would be ascertainable, to a great extent at least, from the evidence as to the capacity, at the time of death, of the deceased to earn money. The clergyman's widow and children would be entitled to neither more nor less because there were few or many children, and so with the hod-carrier's widow and children.

This language of the court must necessarily have created the impression upon the minds of the jurors that the number of children, the condition in life of the family, and the sex of the children were proper elements for their consideration in estimating damages, and that many children would be entitled to more damages than a few, girls to more than boys, and a rich man's children, accustomed to the luxuries of life, to more than children unaccustomed to them.

This court has recently passed upon this question, and in condemnation of a like ruling uses this language:

"There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children—a son ten years of age, and three daughters of the ages, respectively, of fourteen, seventeen, and twenty-one. This evidence does not appear to have been withdrawn from the considera-

tion of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted—that is, beyond what was, under all the circumstances, fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty, but the reasonable presumption is that it had some influence upon the verdict."

Penna. Co. v. *Roy*, 102 U. S. 451.

The judgment of the court below should be reversed.

ENOCH TOTTEN,
For the Plaintiff in Error.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE BALTIMORE & POTOMAC RAILROAD COMPANY,
PLAINTIFF IN ERROR,
vs.
FRANKLIN H. MACKEY, ADM'R.

No. 84.

Brief for Defendant in Error.

FRANKLIN H. MACKEY,
for the Defendant in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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THE BALTIMORE & POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

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No. 84.

Brief for Defendant in Error.

This was an action instituted, under the act of Congress February 17, 1885 (23 Stats. 307), to recover damages for the death of plaintiff's intestate, Robert A. Brown, who was crushed to death between two of the defendant's freight cars on the night of March 17, 1885, in the city of Washington.

A verdict of $8,000 was rendered, and the case is here on a writ of error.

STATEMENT OF FACTS.

The statement of the case, as contained in defendant's brief, does not relate the material facts as fully as the plaintiff conceives they should be stated.

Robert A. Brown was crushed to death between two of the defendant's freight cars on the night of March 17, 1885, at the New Jersey avenue freight yards, in the city of Washington. His widow and four children survived him. The eldest of the children was fifteen years of age, and the youngest seven; they were all girls but one (Rec. 8).

Brown was employed as a car inspector, and his business was to inspect and repair cars. *But not to repair "foreign cars," because the company did not get paid for it;* but if the foreign car had a broken draw-head, then it was to be repaired.* (Rec. 16). At the time of his death he was about 34 years of age, and had been in the employ of the defendant for over five years at a salary of forty-five dollars a month; he was "the leading car inspector at night" (Rec. 21). Downs, the defendant's witness, and the "chief of car inspectors" in the company's employ, testified that "he, Brown, was bright in the performance of his duties, was a good man—a good, skilled man, and a man I had every confidence in" (Rec. 22). On the question of contributory negligence the jury doubtless took this fact into consideration, for "good, *skilled* men," in whom their superiors have "every confidence," are not usually guilty of negligence.

On the night in question a fast freight train of about twenty-five cars came in from Baltimore to the New Jersey avenue freight yard (Rec. 18). Ten of these cars were immediately shifted to another track, and three or four more to still another, leaving seven or eight cars standing

* See White's (car-inspector's) testimony, p. 16. "Our company don't hold us responsible for fixing those [foreign] cars, because we don't get paid for it. We are instructed not to use our materials unless it was for a broken draw-head, and then we would have to put in another draw-head."

on the track where the accident occurred (Rec. 32). "It was a fearful bad night, snowing, and the wind blowing very hard" (Rec. 10). It was also "a dark night," and the hour about 10.30 (Rec. 10). A shifting engine was coupled to these seven or eight cars which remained of the original train. "A full crew with a shifting engine in a yard is six men, consisting of an engineer, a fireman, a conductor, and three brakemen. On the night in question there were only *two* brakemen," although "*three* brakemen were *necessary* to man such an engine as they had on that night" (Rec. 9), *the train being, therefore, one brakeman short.* While this train of seven or eight cars was standing there, Brown discovered that one of the cars had a defective draw-head or "bull-nose, *i. e.*, the protuberance at the end of the car into which the car-coupler is inserted. The "cars were all coupled together," and Brown asked the conductor Phillips who was in charge of the shifting engine employed at that yard to "cut" the train, and told him "that if he would give them five to seven minutes they would repair the car for them, and that if it was not repaired it would be pulled all to pieces" (Rec. 8). Thereupon the cars were "cut" at this point, there being "three or four cars between the tender and the car with the defective draw-head" (Rec. 12), viz., a stock car, a coal-oil tank car, and two coal cars, all heavily loaded (Rec. 9). These three or four cars were pulled away (one witness said about 10 feet, Rec. 9, and another about 40 feet, Rec. 28) by the shifting engine from the car with the defective draw-head. Then the conductor Phillips told Brown that "he was not going to shift any more of those cars" (Rec. 28); that "he was going to leave those cars [which had been pulled away] standing there" (Rec. 28 and 30). Then Brown went up to the defective draw-head and went to work at it (Rec. 9). Just as Brown went to work

the engineer called Phillips, who then left Brown, and went to the engine. The engineer said he wanted water; "that he had no more water to do any shifting with" (Rec. 28). Whereupon Phillips told the engineer to go and take "a load of stock [cars] from the lower end of the freight yard up to the warehouse, and stop at Sixth street and get water" (Rec. 28). The engineer said, "Well, I will try it." Phillips then turned to the brakeman Teiling and asked, "How is it?" Teiling replied, "All O. K." Then, said Phillips, "Get up on the end brake and put it down and cut loose," or words to that effect (Rec. 12). It was the "end brake" on the car next the tender (Rec. 12). Teiling says he "got up and put down the brake, and gave the signal for the slack, and pulled the coupling pin" (Rec. 12). Just as he pulled the pin out of the coupling between the car and the tender he jumped on the tender, and the four cars started of their own momentum down the grade, which was "a very steep grade." They moved silently along, naturally gaining in speed. The night was dark; it was blowing hard, and noiselessly they crushed into Brown, who, standing with his back to the moving car, and in total ignorance of his impending fate, was at work at the defective draw-head. He was, of course, instantly killed. The brakeman Teiling says that he set the brake as tight as he could; "swung on to it hard," and that "a good brake will hold four cars on that grade" (Rec. 13). Phillips, the defendant's witness, was of the opinion that "a good brake would hold eight cars" (Rec. 29). A day or two after the accident it seems to have occurred to the road officials that it would be well to look up the brake which the brakeman says "should have held these four cars," and which the defendant says should have held eight cars, and see what was the matter with it. So Downs, the chief car inspector, testifies (Rec. 23), "I got

orders to look after that car to see what condition it was in." This was "on the day after the accident or the second day after the accident" (Rec. 14). "They [the officials] gave me the number of that car, and that number I found" (Rec. 24). When they found the car it was observed that it was marked in chalk on the ends and on both sides "defective brake," and that these marks looked as if they had been on there "for some time" (Rec. 16). On examining the brake it was found to be out of order. "The connections did not work *as they ought to have worked*." "They were too short" (Rec. 24), and the car itself was a "foreign car" (Rec. 15).

These are the facts as shown by the testimony, and they clearly tend to show, and the jury must have so found—

1st. That on the night of the accident there were but two brakemen, while the "necessary" force of brakemen was three. *The force, therefore, was one man short.* Had there been another brakeman on the train the accident would probably not have occurred, for the other brakeman would have set a good brake, and "a good brake will hold four cars." Another witness said it would hold eight cars.

2d. That the brake which Teiling undertook to "set" was out of order and would not hold the cars, in consequence of which they slipped down the steep grade and crushed Brown to death.

3d. That the car to which the defective brake was attached was a foreign car and had been probably placed in the train either at Baltimore or somewhere south or west of that point and was at the time it was placed in the train clearly marked "defective brake."

4th. That the car inspectors are forbidden to make repairs of defective brakes when they belong to *foreign* cars, "because the company is not paid for doing the work."

The jury had, therefore, a right to presume that but for this rule the defective brake would probably have been repaired by the company's force at Baltimore and the accident would not have occurred.

With evidence before them tending to show such a state of facts, the jurors found that the defendant had been guilty of negligence and that there was no contributory negligence on the part of the deceased, and their verdict for the plaintiff was the natural sequence of this finding. Now it is the judgment which was rendered on this verdict of which the defendant complains, and the case is brought here on a bill of exceptions, attached to which, as required by the rules of this court, is the assignment of errors complained of.

The Assignment of Errors.

The assignment of errors set forth in the record and those to be found in the learned brief of defendant's counsel are not exactly alike. Some of those in the record are not to be found in the brief, and I shall therefore assume that they have been abandoned, and discuss only those which are to be found in the *latest* assignment, viz., those in the brief.

But, since there can be no alleged error of the trial court examined here but those which were properly excepted to at the time of trial and brought here by a proper bill of exceptions, I shall, with the permission of the court, discuss the exceptions in their order and with reference to the assignments of errors.

First Exception (Rec. 7 and 8).

Not Assigned as Error.

This is to the admission of plaintiff's letters of administration. It has never been pressed since the trial, and as

no allusion has been made to it either in the assignment of errors or in the defendant's brief it must be treated as abandoned, as it doubtless is.

SECOND EXCEPTION (Rec. 17).

Not Assigned as Error.

This exception was to the refusal of the court below to direct a verdict for the defendant on the close of plaintiff's evidence in chief. It was necessarily abandoned when the defendant proceeded to give testimony in its own behalf. It is not assigned as error.

THIRD EXCEPTION (Rec. 26).

Not Assigned as Error.

This exception is to the refusal of the court to allow certain printed rules (Rec. 26) for the conduct of car inspectors to be read to the jury. It is not assigned as error and is not alluded to in the defendant's brief. It must be taken as abandoned.

The refusal, however, was right. It was contended that the plaintiff's intestate was bound by their rules, but it is plain that such could only be the case where such rules had been brought to his knowledge. This the defendant's own testimony shows was not done. Downs, the chief car inspector, testified (Rec. 21) that he did not give a copy of these rules to Brown, and on page 24 that he did not read them to him.

FOURTH EXCEPTION (Rec. 33).

Being the *First Assignment of Error* (Deft. brief, 9).

This exception constitutes the first assignment of error. The exception is in these words :

"And thereupon, the testimony on both sides having been closed and given to the jury, as set forth in the foregoing bills of exceptions, which is referred to as part hereof, the defendant, by its counsel, moved the court to instruct the jury, upon the whole evidence as aforesaid, to return a verdict for the defendant; but the court overruled said motion and refused to so instruct the jury to return a verdict for the defendant, as requested, to which ruling of the court in so refusing to instruct the jury to return a verdict, the said defendant, by its counsel, then and there duly excepted," etc., etc.

The first criticism to be made upon this exception, and the same will apply to all the others, is that it presumes that the various bills of exception contain *all* the evidence given at the trial. It is submitted that the record contains nowhere any such statement, and the learned counsel for the defendant is challenged to show any *equivalent* statement in the record.

The language of the record is that the plaintiff, "to maintain the issue on his part joined, gave evidence to the jury tending to show that," &c. (Rec. 8). And at the conclusion of the record, at page 33, it is said, "And thereupon, the testimony on both sides having been closed and given to the jury as set forth in the foregoing bills of exceptions," &c. Neither of these statements attempts to state that the testimony as recited in the record was *all* the testimony given at the trial, and, if they did, it would not be sufficient, for the language should be: "all the *evidence*." Testimony is evidence, but evidence is not necessarily testimony. It is well settled that the record must expressly state that it contains *all* the evidence in order that the court may pass upon the correctness of a ruling which declares that upon *all* the evidence given at the time the court will not take the case from the jury.

Thompson on Trials, vol. 2, sec. 2784, states the de-

gree of preciseness required in a bill of exceptions in respect of the statement as to the record containing the evidence. He says:

"It is not sufficient that it (the bill of exceptions) contains a recital that 'that was all the testimony given in the cause,' since the word 'testimony' is not synonymous with evidence; nor will it be sufficient for it to recite 'this was all the evidence *offered* on the trial of the cause' since it is not enough that it should have been offered, it should also have been admitted. It is necessary that it should state that it was '*all* the evidence *given* in the cause.'"

But, aside from the question whether the recitals of the record show that it contains "*all the evidence* given at the trial," it is submitted that the court did perfectly right to refuse to take the case from the jury.

"If upon any construction which the jury is authorized to put upon, or any inference they can draw from the evidence, the conclusion of negligence can be justified, the question of negligence must be left to the jury."

Sioux City & Poc. R.R. Co. *v.* Stout, 17 Wall. 657.
Weightman *v.* Washington, 1 Black. 39.
Holliday *v.* Kennard, 12 Wall. 254.
Randall *v.* Balto. & O. R.R. Co., 109 U. S. 478.

One of the supposed defences strongly relied upon in this court by the learned counsel for the defendant (p. 14 of his brief) is that it was Brown's duty, as a car inspector, to have discovered this defective brake and to have repaired it; consequently in not doing so it is said he was guilty of contributory negligence, and that the court should so have instructed the jury.

Conceding for the moment that this fact, if true, would be a defence, a perfect answer to the proposition is that

it is an entirely new position taken in the appellate court for the first time. It was never urged at the trial and is a complete after-thought suggested to the defendant's counsel by the exigencies of his client's case.

At the trial the plaintiff's contention was that the facts tended to show the defendant to have been negligent in putting into its train at a point south of Washington a "foreign car" having a defective brake; that the defendant had full notice of the defect from the fact that the said car was chalk-marked "defective brake"; and that because of this defective brake the death of Brown resulted.

These facts the jury by its verdict is presumed to have found.

The jury must also have found, since proper instructions were given it by the court, that Brown was not guilty of contributory negligence; otherwise the verdict under the instructions would have been for the defendant.

This theory of defective brake *vel non* was the theory upon which the case went to the jury under the instructions of the court, and it was the theory upon which the learned counsel for the defendant was content to have it go, as is plain from the fact of his asking no instructions upon a different theory. Moreover, in his 7th and 8th prayers for instructions (Rec. 36), he expressly accepts this theory of the case and asks the court to instruct the jury as follows:

"Unless the jury shall be satisfied from the evidence *that a defect in the brake which was set by Teiling on the stock car just before the accident, was the sole cause of the injury* to Robert A. Brown, the plaintiff's intestate, and *that said brake was in such defective condition at the time the said stock car was by the defendant put into its train*, the plaintiff cannot recover, and the burden of

proof is upon the plaintiff to show, by evidence satisfactory to the jury, *that said brake was in such defective condition* before said car was by the defendant put into the said train."

The 8th prayer was as follows:

"If the jury shall find from the evidence that the injury to Robert A. Brown *resulted solely in consequence of some defect in the brake* set by Teiling on the open or stock car next to engine and tender, and that the said stock car was not the property of the defendant but belonged to another railroad company, had been on the same evening and a short time prior to the accident, brought to the defendant's yard, in Washington, in a freight train, *with the brake in such defective condition*, then the fact (if the jury shall so find the fact) that such injuries did so result, cannot be considered as evidence to support the charge of negligence against the defendant, and the defendant is entitled to the verdict."

These two prayers plainly concede the proposition that the defendant would be liable if the brake was defective and Brown's death resulted therefrom, *provided* the brake was defective *before* the car was put into the train, and also that the car was not a "foreign car." Since the trial, however, the learned counsel for the defendant has changed his ground, and he says *now* that it matters not whether the brake was defective or not, for it was Brown's duty to repair it, but no such proposition was advanced in the trial court.

The only instructions prayed for by the defendant having any allusion to the defective brake are those above recited. They were, of course, properly refused because of the erroneous propositions of law they contained concerning the burden of proof, &c. They, however, serve a useful purpose in showing the *theory* upon which the de-

fendant tried the case before the jury, viz., that the case was, under certain conditions, to turn upon the question whether the brake was defective or not. Nowhere in this entire record is there the slightest hint of a claim before the trial court that the defendant was not liable because Brown was a car inspector, and as such was *per se* negligent in not discovering the defective brake in proper time, and because, as such car inspector, he took the risk incident to repairing damaged cars. These propositions of law, even if sound (and they are not), cannot be raised for the first time in an appellate court. If they were not presented to the trial judge for his rulings, and an opportunity thus afforded the plaintiff to meet them either with evidence or counter propositions of law, they cannot be available here. Where a case is contested before the trial judge on certain lines of defence, it is too late, after a full and fair trial upon a battle-ground of the defendant's own choosing, to permit the trial to be reopened in order that he may make another and entirely different defence upon new theories worked out by candle-light, after his original plan of defence has been rejected by the court and jury because they believed the alleged facts upon which his defence was based to be untrue.

The authorities declaring that a new defence cannot be raised for the first time in an appellate court are so numerous that it is difficult to select and arrange them. I give below, however, some of the utterances of that court upon the subject:

"It is a general rule that questions not made on the trial or presented to the court below for decision cannot be entertained by this court."

Barrow *v.* Reab, 9 How. 366.

"It has been argued here that, as it appears from the

testimony, which has been incorporated into the bill of exceptions, that the importation in this case was from Prince Edward Island, it was not from 'beyond the seas,' and therefore that the judgment below was right. It is a sufficient answer to this objection that no such point was made below. *The court was not asked to rule on any such question.* Our examination is confined to such exceptions as were taken to the rulings actually made on the trial and incorporated in some form into the record."

Morril *v.* Jones, 106 U. S., p. 467.

"It is enough to say that the question, for aught that appears in the bill of exceptions, was not raised on the trial."

Ins. Co. *v.* Mordicai, 22 How. 117.

"It is insisted on in this connection, that the reissue is void, because it was not for the same invention as the original patent. This point does not appear to have been taken in the court below, and, therefore, cannot be made here. *No instruction was asked or given touching the subject.*"

Klein *v.* Russell, 19 Wall. 463.

"It is suggested further, in behalf of the plaintiff in error, that the amount found by the verdict of the jury, and for which the judgment was rendered, includes interest on the coupons, which, it is alleged, is contrary to the statute of the State in force when the bonds were issued. It is sufficient to say upon this subject, that *the objection, not having been made in the court below*, cannot be taken here. To hold otherwise would involve the exercise on our part of original instead of appellate jurisdiction.

United States *v.* Ferrory, 93 U. S. 624.

"The point should have been distinctly and specifically made [in the court below] and an appropriate exception taken upon the record."

Wheeler *v.* Sedgwick, 94 U. S. 3.

"The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below and passed upon directly or indirectly."

Wood *v.* Wernior, 104 U. S. 795.

"The objection does not appear to have been taken in the circuit court, and cannot, therefore, be considered here."

Wilson *v.* McNamee, 102 U. S. 574.

Edwards *v.* Elliott, 21 Wall. 532.

"The point was not brought to the attention of the court below, and cannot, therefore, be insisted upon here."

Springer *v.* United States, 102 U. S. 593.

The objection to the grant, which supposing it to be genuine *is insisted on in the first place, in this court*, by the counsel of the plaintiff in error, presents a question which *in the state of the record this court is not called upon to decide; for it does not appear that the objection was taken in the court below.*

Rogers *v.* Ritter, 12 Wall. 320.

"The obvious answer to the objection is that it comes too late. It should have been made in the court below."

The Georgia, 7 Wall. 38.

"Claim is also made in argument that the defendants had sold a part of the lumber, but it is too late to raise any such question in this court, as none such was raised at the trial, or reserved in the bill of exceptions."

Tome *v.* Dubois, 6 Wall. 555.

The record shows that every one of the instructions prayed for by the defendant was so preposterously unfair that the court could do nothing less than refuse them all, so that the case went to the jury absolutely without a single instruction framed by defendant's counsel. The

court, in the absence of them, submitted the case to the jury as according to the law and facts it deemed it should be submitted. If the defendant's counsel desired instructions which the jury should have had and did not have, it is his own fault in not asking for them, and it is too late now to complain of it.

But, conceding for the moment that the defendant may be allowed to set up this new defence here, let us see if it be well taken. The learned counsel's present proposition, as stated in his brief (p. 13), is this:

"If negligence could ordinarily be charged against the defendant because of the brake being out of order, it must in this case be charged upon the plaintiff's intestate, because he was employed, and it was his duty, to discover the disordered condition of the brake and to repair it, and his failure to do so was his negligence."

This proposition is made in face of the evidence, which tends to show that the car in question was placed in the train probably south or west of Baltimore; that it had for several days been marked with chalk upon the sides and ends "defective brake," thus giving full notice to the defendant of the character of the car, and also in face of the evidence that this train, consisting of twenty-five cars, came into Washington on a dark snowing night, and that, shortly after all but eight of the cars had been distributed to other tracks, it was approached by Brown, who, immediately on discovering the broken "bull-nose," proceeded to repair it, and while in the act of so doing was run into by a train of four cars and killed. The cause of the "accident," if it may be called such, was the inability of the one brakeman (the train being one "short" and Hillery, the only other brakeman, being employed elsewhere) to hold the cars with a defective brake, and a brake, too, which,

even if Brown had discovered it, he was not permitted to repair, for the witness White, who was also a car inspector, tells us what the rule of the company is when foreign cars come into its yards, viz., to chalk-mark them defective, but not to repair them except where the coupling apparatus is out of order. He tells us (Rec. 14), and the jury believed him:

"Q. Whose duty is it to put those [chalk] marks on?
"A. Well, you see the duty comes under this head. There are cars which come into our yard which are out of repair, and there are cars that come in there from other companies [viz., foreign cars]. Our company don't hold us responsible for fixing those cars, *because we don't get paid for it.* We are instructed not to use our material unless it is for a broken draw-head, and then we would have to put in another draw-head. * * *
"Q. Who marks those cars 'bad brake' with chalk?
"A. Well, it was the car inspector's place."

So that in all probability a car inspector in Baltimore had inspected this car, and finding the brake out of order and being forbidden by the rules of the defendant to repair it, did the next best thing and marked it "defective brake." Then the car inspector's duty ceased, and the defendant's duty began. It should not have permitted a car with defective machinery to be run in its train. It should either have repaired it or taken it out of the train. By failing to do either, it assumed the responsibility for any injury to its employees resulting therefrom, and the duty to see that it was repaired or removed from the train was a duty which this court, in Northern Pac. R.R. Co. *v.* Herbert (116 U. S. 643), says: "He cannot *delegate* to a servant so as to exempt himself from liability for injuries caused to another servant by the omission." And so are all the authorities. Nay, the law goes even further than

this, as this court has said in Grand Trunk R.R. *v.* Cummings (106 U. S. 702): "If the negligence of a railroad company contributes to, that is to say, has a share in producing, an injury to an *employé*, it is liable, even though the negligence of a fellow-servant of the injured person is also contributory." And see Patterson's Railway Accident Law, 337, where this case and many others are cited upon this point.

Now, under such circumstances, it is absurd to contend that Brown was guilty of contributory negligence in failing to repair that which, according to the evidence, this company, from a streak of economy, had forbidden its car inspectors to repair! It is plain that this rule of the company not to make repairs (except as to coupling apparatus) of foreign cars led to this car being kept in the train at Baltimore without being repaired there by the company's workmen, as would have been done had it been one of the company's own cars. It preferred to endanger the lives of its employees by using cars with defective brakes rather than incur the expense of repairing property which did not belong to it. This rule, therefore, not to repair foreign cars except in the case of draw-heads,* was an unreasonable rule for the conduct of its business. It should, as we have said, either refuse to take such cars or repair them if it does take them. It is well settled that if damage results to an employee because of the want of reasonable rules for the management of its railway business, the company is liable. Thus:

"Where a car repairer was injured by the movement of

* A draw-head is absolutely necessary to couple the car to the train, but a bad brake in *one* of a train of cars can be put up with; at least the company thought it better to do so than to pay for mending something that does not belong to the company.

a switch engine by other employees against the car on which he was at work in consequence of negligence *in omitting to have reasonable rules* for the management of its railway business, it was held that the company was liable."

Abel *v.* Delaware & H. Canal Co., 128 N. Y. 662.
Wild *v.* Oregon R.R., 21 Oregon, 159.
Smith *v.* Baker, L. R. App. cases, 325.
49 N. Y. S. R. 568.

"A defective system or mode of conducting the practical workings of a railroad may be actionable if injury result therefrom, though the immediate damage should be caused by the act of a fellow-servant."

International & G. N. R. Co. *v.* Hall, 78 Texas, 657.
Ford *v.* Lake Shore & M. S. R. Co., 124 N. Y. 493.

THE INSUFFICIENT FORCE OF BRAKEMEN ONE OF THE PROXIMATE CAUSES.

Moreover, it is reasonable to presume (and so the jury may have thought) that the accident would not have occurred had a full complement of brakemen been supplied to the train instead of its being, as was testified, short of brakemen.

"It is the duty of a railroad corporation to see that there are a sufficient number of brakemen to its train, and if this duty is neglected, and an injury results to one of its employees therefrom without contributory negligence on his part the corporation is liable."

Booth *v.* Boston & Albany R.R., 73 N. Y. 38.
Flake *v.* B. & A. R.R., 53 N. Y. 551–554.

An employee does not undertake to incur the risk arising from the want of sufficient laborers.

Herbert *v.* R.R., 116 U. S. 648.
Hough *v.* R.R., 100 U. S. 213–218.

Contributory Negligence.

It will be observed by this court, as was observed by the general term, that no proper instruction on the subject of contributory negligence was asked for by the defence on the trial below. It is, therefore, difficult to see how he can be allowed a new trial in order that he may be afforded another opportunity to ask for something that he failed to ask for at the proper time.

Nevertheless, the question of contributory negligence, though ignored by the defendant, was not ignored by the trial court, but, on the contrary, was, on its own motion, fully and fairly submitted to the jury in the charge which is set forth in the record. Thus, among other similar observations, the court said:

"If you say the brake was all right, that ends the case. If you say that it was not all right and that a good brake would have held the car, then the next question is, was the plaintiff's intestate himself negligent, imprudent, or careless, contributing to the injury directly? And if so, the plaintiff could not recover."

This instruction was given by the court of its own motion, and there is no proper exception to it. The defendant's counsel, as we have seen, asked for no instruction upon the question of contributory negligence (excepting those which sought to put the burden of proof upon the plaintiff, and which were properly refused). He, therefore, cannot complain if he did not get exactly what he wanted on this subject, since he did not properly ask for it, or properly except to what was given.

The instruction of the court was, however, sufficient, and the jury could not, under that instruction, have found a verdict for the plaintiff if it had believed the plaintiff's in-

testate guilty of any contributory negligence. The finding of the jury, therefore, settles the question that the plaintiff's intestate was not guilty of contributory negligence.

But, all of these questions aside, the theory of my learned brother as to the obligations of car inspectors is utterly untenable. A single car inspector cannot be expected to be responsible for the good condition of all the cars of a railroad company. He can neither inspect nor repair cars except at points where he is directed to work. Nor can he discover in a single moment all the defects in a train he is inspecting. If he discovers a defect and starts to repair it, he is performing his duty. How can he be held responsible for defects in some other car than that which he is inspecting? It is the duty of the company to keep its cars in good condition, and this court has repeatedly held that it cannot delegate this duty to a servant so as to relieve itself of responsibility. Its duty to car inspectors is not less than its duty to any other of its servants. To hold the contrary would be to leave car inspectors to the mercy of any railroad company, which hereafter, so far as these workmen are concerned, may put all the damaged and defective cars it pleases in its trains, and then, when its workmen are injured by reason of this negligence, escape liability by saying: "Oh! he was a car inspector." Indeed it might escape liability to its entire force of trainmen by requiring that, in addition to their other duties, they should be car inspectors. It is a matter of common knowledge that it is the duty of all trainmen to look out for defects in the cars of their road, and especially of their own trains, and to repair them if the defect be such as they can remedy. A defect in the machinery which might have been easily discovered and easily remedied by the trainmen is often the cause of a

serious railroad accident, and yet it has always been held that when trainmen are injured by such defects the company is liable. But if the astute argument of the defendant's counsel be sound, the courts have all been wrong, because it was the trainman's duty to have looked out for this defect and to have repaired it.

Where the negligence of the railway in supplying defective appliances is the proximate cause of injury to a servant, it is no defence to the railway that the negligence of a fellow-servant concurred in causing the injury.

Note to Patterson Ry. Accident Law, 337.

If the negligence of the company had a share in producing the injury the company is liable, even though the negligence of a fellow-servant was contributory also.

Grand Trunk R.R. *v.* Cummings, 106 U. S. 702.

Whether a defective brake could have been discovered by the exercise of reasonable care on the part of the company, is a question for the jury.

Leahy *v.* So. Pac. R.R., 15 Am. & Eng. R.R. Cas. 230.

OF THE ALLEGED FAILURE TO PUT OUT "BLUE LIGHTS."

Another of the arguments advanced by defendant's counsel for reversing the judgment in this case is that the deceased "neglected to display his blue light" and was therefore guilty of contributory negligence.

Again, we have to observe that the record shows that *no instruction whatever was asked upon this point.* The defendant was content to let the case go to the jury without their attention being directed to the fact whether or not the deceased neglected to display blue lights, and that if they found he did so neglect, he was guilty of contributory negligence. Now, my learned brother's

belated "second thought" has come to him, and this court is asked to send the case back in order that the jury may be directed to consider on a second trial what they were not asked to consider on the first. The jury may well have thought that the failure to display blue lights did not constitute contributory negligence. If the defendant claimed that such failure was negligence, then it should have asked to have the jury so instructed. It is therefore too late to raise the point now.

But the fact is there was no *failure* to display blue lights, because there was no rule or regulation shown *requiring* their display under the facts of this case. On the contrary, the evidence is that they were not required. White, a car inspector, testified that "We are not allowed to put a [blue] light there when an engine is attached to the end on that same track" (Rec. 16), and the undisputed evidence is that the engine was attached to the train "on that same track."

The rule which the learned counsel succeeded in getting in evidence notwithstanding its plain inadmissibility (for it was shown to have been printed on the back of a time-table which was tacked to the wall with the time-table to the front, so that nobody could see the rule 26) makes no *requirement* and gives no *direction* for the display of blue lights. It only declares what a blue light "*denotes*." Moreover, if the rule is to be taken as mandatory, yet it has no application to the case at bar, for it is only when at work "*under* the car or train" that a blue light is to be displayed, and the deceased was not *under* the car at all, but was standing by it. Downs, the plaintiff's own witness, says he told Brown not to go *on* a car without a blue light, &c.; but, as we have seen, he was not *on* the car.

Again, the alleged failure to display blue lights, even if it

be conceded they were required (and White's testimony, Rec. 16, which was before the jury, is conclusive that they were not), in no manner contributed to the accident. What is the alleged purpose of the blue light? Why, to indicate to *other* trains and engines that men are working *on* or *under* or, if you please, *at* a car, and therefore they were not to "touch" that car. But in the case at bar Phillips, the conductor, never intended to touch the car. He says of the four cars attached to the engine and which were some 30 or 40 feet up the track, "I intended to leave them standing there," and when he gave orders to cut loose the engine it was still with the intention of leaving them "standing there." They were not to be moved. So that if there had been forty blue lights on Brown's car, and Phillips, the conductor, had seen every one of them, it would have made no difference whatever in his action. He would have gone on and done just what he did do. *He did not intend to touch Brown's car* or to go near it. He intended that the four cars should *stand* where they were, and they would have stood there but for this defective brake, which permitted them to move in spite of Phillips' efforts to keep them still. Phillips did not "run" the four cars into Brown's car, neither did the engineer, who says he could not have seen the lights anyway. They were not *misled* by the absence of blue lights, and it is folly to say that they were. They intended to do just what they should and would have done had blue lights been there, viz., put on the brake and leave the four cars standing on the track. That they did not stand there, we repeat, was not their fault, but the fault of the defective brake.

The practice in regard to blue lights, and the object of using them, is explained by car inspector White (Rec. 16). "There was a verbal rule given to car inspectors in regard

to placing a blue light upon the car. The rule is, when we are repairing in a train or out of one—when out of a train or with an engine attached to the end of the train we are not supposed to use a blue light; but when we are repairing a car on any track when there is not an engine attached to it we are supposed to put a blue light on the head car to the one we are repairing simply. If that is the only car, then we are supposed to put it on that; but if there are cars above it we are supposed to place it on the end car. *Then the roadmen would say that there were car inspectors there and not to touch or move those cars until that light is removed, but we are not allowed to put a light there when an engine is attached to the end on that same track.*"

If this had been a case where the conductor purposely ran a train against Brown's car with the intention, for instance, of shifting it, supposing no one to be working there because no blue lights were exposed, there would be room to argue that Brown misled the conductor and caused him to do that which he would not have done had blue lights been hung out; but Phillips had no such purpose, and did not do any such thing.

Moreover, as we have seen, White's testimony is conclusive that *Brown was not required to put out blue lights* by any rule of the defendant's company when the engine is attached to the train, because there is no need for it then, and that is an end of the point (?) if the jury believed White.

"Risk Incident to Service."

But the defendant contends that Brown was employed to handle and repair damaged cars, and therefore took the risk incident to the service. Again it is to be observed that

this point was not made in the trial court; no instruction whatever was asked upon the subject. The record is perfectly innocent of even a hint that such a defence was intended to be made. But even if this defence had been set up at the trial, nevertheless the risk which Brown took was in being injured by the car he was handling and not by some other car. He did not agree to assume the risk of the defendant's negligence in putting a foreign car into its train with full notice that it had a defective brake, which negligence (to say nothing of the train being short of hands) was the direct cause of the car running into him. Nor did he assume the risk of the negligence of the defendant in making a rule which prohibited the workmen from repairing the defective brake because of the cost to itself. Nor did he assume the risk of an insufficient force of workmen, viz., of two brakemen instead of three, the "necessary force."

FIFTH AND SIXTH EXCEPTIONS (Record, 33 and 34).

Second Assignment of Error.

These are to the granting of the plaintiff's two prayers—all that were asked by him. They constitute the second assignment of error, and for the convenience of the court are here printed:

1. "The jury are instructed that the employees of a railroad corporation have a right to expect that the corporation will, as far as possible, provide for their protection in moving its trains sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes; if, therefore, the jury believe from the testimony that the brake set by the brakeman Teiling was defective at the time of the accident, and that by the exercise of reasona-

ble care and caution the defendant could have known said brake to be defective, then it is liable, and their verdict must be for the plaintiff, provided they believe from the testimony that the accident was caused by reason of said defective brake.

2. "The jury are instructed that if they believe from the evidence the brakes set by brakeman Teiling as detailed in the evidence would, if then in good order, have prevented the cars from moving, or at least would have tended to retard such movement so as to have given sufficient time to notify Brown of his danger and to have enabled him to escape, then if the jury believe from the evidence that the brake was not in good order at the time of the accident, and, further, that the defendant by the exercise of reasonable care could have known of its defective condition, their verdict must be for the plaintiff."

The language of this court in Northern Pac. R.R. *v.* Herbert (116 U. S.) fully sustains the propositions laid down in these instructions. In that case Mr. Justice Field, delivering the opinion of the court, said:

"It is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. *This duty he cannot delegate to a servant so as to exempt himself from liability* for injuries caused to another servant by the omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of *sufficient* and skilful co-laborers or from *defective machinery* or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger will ensue to him."

And a large number of cases are cited in support of this proposition.

But the learned counsel for the defendant in his ingenious brief (p. 16) objects to the words "as far as possible" as they are contained in the first part of the first of these instructions, viz:

"The jury are instructed that the employees of a railroad corporation have a right to expect that the corporation will, as far as possible, provide for their protection in moving trains sufficient machinery in good order and condition, and that it exercise reasonable care and caution not to use cars in its trains having defective brakes."

And he says "To provide the best *possible* appliances and to keep them in the best *possible* order has never been required, and, indeed, could not be."

The court will observe that in these two instructions the general principle of liability of a railroad corporation to furnish safe machinery is stated. They were excepted to by the defendant's counsel, not because as a *lawyer* he would dispute the law there laid down, but because of the invariable practice of all counsel to except to the granting of *any and all* instructions specially prayed for by the opposite party. Then, when the time arrives for counsel to prepare for the appellate court, the midnight oil is burned in the search for some imagined error in the language of the court. If the proposition is sound when interpreted with reference to the fair and ordinary meaning of the English language, then that ordinary meaning is sought to be twisted into an extraordinary meaning. The phraseology is scrutinized with a criticism limited only by the astuteness of counsel. At last and suddenly, in his zealous imagination, he conceives that a *word*—a single word—is out of place, or may possibly be clothed with a meaning never before thought of. The idea (?) is elaborated over a page or more of an ingenious brief, and

the appellate court is asked to send the case back for a new trial, to afford the court below an opportunity to substitute some other *word* in its otherwise unobjectionable instruction. It matters not that it never occurred to him to *ask the court at the trial* to do that which he is now for the first time suggesting it should have done. In all fairness it is submitted that the practice is not to be suffered. The authorities cited upon the subject elsewhere in this brief apply here with equal force. If a particular *word* in a long instruction to the jury is obnoxious to counsel, it is easy enough for him to call the attention of the trial judge to the fact and ask that the word be qualified or another substituted, and unless the record shows that this was done and that the court refused to comply when it should have done so, then no ground is laid for complaint in the appellate court. To suffer the suggestion to be successfully made before the reviewing court for the first time would, we submit, be monstrously unfair to the meritorious litigant.

But, as a matter of law, the instruction was an actual limitation upon the rule of liability and a relaxation of its rigor in favor of the defendant. When it is said that the law requires the master to provide safe machinery, the rule is stated with much more rigor than when it is said the law requires the master to provide (as far as possible) safe machinery. A jury of English-speaking men would understand such language to mean, as it undoubtedly does mean, that the master should not be held to an unreasonable responsibility.

Finally, even if it be conceded that the use of this particular word in this particular place with the meaning given to it by the defendant was error, yet its true meaning was plainly interpreted by the charge, for the court distinctly told the jury again and again that it was only

necessary for the brake to be in a *reasonable condition*. It told the jury that the question for it to consider was:

"Was the brake in proper *reasonable condition?* If it was not in a proper *reasonable condition*, did the cars roll back in consequence of that infirmity? Was the accident traceable to that? I will say here, gentlemen, that if you should be satisfied, from the evidence in this case, that this brake was in a *reasonably good condition*, in good *ordinary repair*, and there was nothing wrong about it, then the plaintiff cannot recover."

Again:

"So you see, gentlemen of the jury, the only question, so far as the negligence of the defendant is concerned, is, was the brake defective, out of order, not in *reasonable* repair, not *reasonable* for the occasion, and if not, was such fact the cause of the accident?"

Six separate and distinct times the court tells the jury the brake need only have been in *reasonably good condition*, and yet in spite of all this reiterated language the defendant's counsel insists that the jury took the case understanding the court to say that the brake must be in the best *possible* condition!

"Where the charge to the jury taken as a whole fully and fairly submits the law of the case, the judgment will not be reversed because passages extracted therefrom and read apart from their connection need qualification."
Evanston *v.* Gunn, 99 U. S. 660.

"Appeals on the ground of minute distinctions should not be encouraged."
The Sybil, 4 Wheat. 98.

"Where an instruction, though not in the best form of words, is sufficiently intelligible, and has been rightly in-

terpreted by the jury, in reference to the evidence, a reversal will not be ordered in the indulgence of nice criticism."

Rogers *v.* The Marshal, 1 Wall. 644.

THIRD ASSIGNMENT OF ERROR.

There is no exception to which this third assignment of error can be referred. It is as follows:

"By trying the case on the theory *that the accident was attributable to a defective brake*, contrary to the case made by the defendants—that is to say, that the accident was caused by the negligence of the defendant's servants in allowing a train to 'run into' the train in which the deceased was working."

As we have seen, from the authorities heretofore cited, unless the defendant can show some well-taken exception to which this assignment of error can be referred, the assignment cannot be considered. But, as we shall see from the instructions asked for by the defendant, this "theory" of which complaint is made is the very theory upon which the defendant itself wished the case to be tried, viz., defective brake *vel non*. We reprint these instructions in this place in order that the court may see at a glance whether the theory upon which the learned counsel complains that the case was tried is not the very theory upon which he himself framed his instructions and asked that they be granted.

Unless the jury shall be satisfied from the evidence that a *defect in the brake*, which was set by Teiling on the stock car just before the accident, was the sole cause of the injury to Robert A. Brown, the plaintiff's intestate, and that said *brake* was in such *defective condition* at the time the said stock car was by the defendant put into its train,

the plaintiff cannot recover, and the burden of proof is upon the plaintiff to show, by evidence satisfactory to the jury, that said *brake* was in such *defective condition* before said car was by the defendant put into the said train.

If the jury shall find from the evidence that the injury to Robert A. Brown resulted solely in consequence of some *defect in the brake* set by Teiling on the open or stock car next to engine and tender, and that the said stock car was not the property of the defendant but belonged to another railroad company, had been on the same evening and a short time prior to the accident brought to the defendant's yard, in Washington, in a freight train, *with the brake in such defective condition*, then the fact (if the jury shall so find the fact) that such injuries did so result cannot be considered as evidence to support the charge of negligence against the defendant, and the defendant is entitled to the verdict.

If these instructions do not tell the jury that if it believed the accident to be "attributable to a defective brake" the verdict should be for the plaintiff unless it believed the car to be a foreign car, then we do not know what the English language means; and if it means what we say it does, then the defendant itself desired the case to be tried "on the theory of a defective brake."

SEVENTH EXCEPTION (Rec. 34).

Not Assigned as Error.

This exception is to the rule laid down by the court as to the measure of damages. It is not assigned as error either in the record or in the assignment of errors set forth in defendant's brief. The instruction was strictly correct.

EIGHTH, NINTH, AND TENTH EXCEPTIONS (Rec. 35).

Not Assigned as Error.

These three exceptions are to the three instructions prayed for by the defendant and very properly refused because they sought to place the burden of proof upon the plaintiff to show that the deceased was not guilty of contributory negligence. They are not assigned as error in the brief of defendant's counsel, and therefore will not be noticed further than to cite the following authorities in support of the court's ruling:

"The burden of proving contributory negligence rests on the defendant, not upon the plaintiff, as counsel insisted, and it will not avail him unless it has been established by a preponderance of evidence."

Indianapolis & St. L. R.R. *v.* Horst, 93 U. S. 219.
Wash. & Geo. R.R. *v.* Gilman, 15 Wall. 401.

By not assigning the refusal to grant these instructions as error the defendant thereby admits that the refusal was right. Nevertheless, *no other instruction on the subject of contributory negligence* was asked for by its counsel.

ELEVENTH AND TWELFTH EXCEPTIONS (Rec. 36).

Fourth Assignment of Error.

These two exceptions are to the refusal of the court to grant the two instructions set forth on pages 30-31 of this brief, and they raise the question of the defendant's liability for having defective foreign cars in its trains—a question which is so well considered by the learned justice delivering the opinion of the Supreme Court of the

District of Columbia, which is set forth in the record, that it is scarcely necessary to do more than refer to it. In view, however, of the fact that the car in question had been for some time marked "defective brake", upon its two sides and at both ends, thus affecting the defendant with full notice of the defect long before the car came to Washington, the following language of the court in Gottlieb *v.* N. Y. L. E. R.R., 100 N. Y. 462 (the leading case), is not out of place here:

> "When cars come in from another road which have defects, visible or discernible by ordinary examination, it [the defendant] must either remedy such defects *or refuse to take them.*"

In the case at bar it will be remembered that there was evidence to go to the jury that the defendant had deliberately adopted a rule prohibiting the repair of brakes of defective foreign cars which it took into its trains.

It may also be said that the instructions prayed for are extremely objectionable because, although admitting the liability of the defendant if the jury believed the defect to have arisen *before* these foreign cars were received into its care, yet they placed the burden of proof upon the plaintiff of showing that the defect existed *before* the car was put into the train—a proposition so monstrous as to need no argument against it.

In Ill. Cent. R.R. *v.* Barron (5 Wall. 90) the court held that where the defendant railroad company owned the road it would be liable for a death caused by the fault of another train run, by its permission, by another company on the defendant's road. The principle is the same as that contended for here by the plaintiff, and the reason for it is much stronger in the case of "foreign cars" run by the company owning the road; for if the defend-

ant is liable for the fault of another company in negligently running foreign cars upon the defendant's road, *a fortiori* it will be liable for its own negligence in running such foreign cars upon its own road.

THIRTEENTH EXCEPTION (Rec. 37).

Fifth Assignment of Error.

This exception, embraced in the fifth assignment of error, cannot be entertained for the obvious reason that it contains a series of propositions, some, and indeed all, of which are plainly correct. This portion of the charge covers nearly a page of the record. No effort is made to point out the particular portion complained of. It is, therefore, fully obnoxious to the settled rulings of the court that—

"An exception in gross to a series of propositions cannot be sustained if any one is sound."

Beaver *v.* Taylor, 93 U. S. 46.
Ind. & Stat. L. R.R. *v.* Horst, 93 U. S. 291.
Lincoln *v.* Claflin, 7 Wall. 132.
Beckwith *v.* Bean, 93 U. S. 266.
Cooper *v.* Schlesinger, 111 U. S. 148.
Borton *v.* West Jersey Co., 114 U. S. 474.

FOURTEENTH EXCEPTION (Rec. 38).

Sixth Assignment of Error.

This exception is to a portion of the charge of the court. That the court may see how fairly the trial justice submitted the question of damages to the jury, I insert here the language of the judge as printed in the exception :

"Now, manifestly, you cannot estimate in dollars and cents exactly what the damages are in a case of this kind, if there be any at all. That is not possible. But you may and should take into consideration the age of the man, his health and strength, his capacity to earn money as you discover it from the evidence, his family—who they are and what they consist of—and then, gentlemen, from all the facts and all the circumstances make up your mind how much this family, if anything, probably lose by his death, and that would be how much had this family a reasonable expectation of receiving—how much had they a reasonable expectation of receiving while he lived, if he had not been killed."

The court will again observe that here is a series of propositions to the jury as to what facts they are to take into consideration in estimating the damages. As stated in the comments upon the thirteenth exception, if any of these propositions are correct the exception must fall, even though all the others are incorrect, for it is the defendant's duty to seggregate from the charge the objectionable proposition, and except to that *only*. In other words, he cannot, except *en masse* and afterwards do his picking and choosing, for *non constat* had the alleged erroneous language been directly pointed out to the trial justice he would have corrected it. So much for the technical aspect of this exception. I will now consider what it is the defendant objects to.

First. The court tells the jury, among other things, that in estimating the damages they "may and should take into consideration the age of the man, his health and *strength*, his capacity to earn money as you discover it," etc.

This word "strength" is objected to. It was error, says the defendant, for "there was nothing in the evidence to show whether he (the deceased) was a strong man or otherwise."

It is plain that the learned judge was using the word as only another turn of expression for "capacity," which he uses immediately afterwards. It would be absurd to suppose that he was using it with the same narrow meaning given to the word when we speak of a man with reference to his ability to lift heavy weights, &c. But if it was used in that sense, there was abundant evidence before the jury to justify them in inferring that the deceased was a man of some degree of strength. Thus on page 16 of the record the defendant admits that the deceased was thirty-four years of age and "in sound health." On page 21 it is testified that he was "the *leading* car inspector at night." On page 22 the defendant's own witness, Downs, who was its chief car inspector, testifies that the deceased was a "good man—a good, skilled man, and a man I had every confidence in." On page 32 the defendant's witness, Hillery, testifies "that Brown (the deceased) walked right up to the car and caught hold of the bull-nose and pulled it out." That, at least, was evidence of some, if not of considerable, strength.

The second objection is that in one part of this charge the jury are told that in estimating the damages they may, among other things, consider "his (the deceased's) family —who they were and what they consist of." An ingenious argument is made to show that this was error. If this had been a case where Brown, surviving the injury, had brought suit himself, no doubt an instruction which directed the jury to consider the number of the *plaintiff's* family would have been error, as is shown by the case cited by the defendant. (Penn. Co. *v.* Roy, 102 U. S. 451.) That was not, however, as here, a case of a personal representative suing in behalf of the widow and children for injuries received by their parent and resulting in his death, but a case where the parent *himself* was the

plaintiff. In the case at bar, although the administrator brings the suit, the *real* plaintiffs are the widow and children, who sue under a statute which declares that "Such damages shall be *assessed* with reference to the injury * * * to the widow and next of kin of such deceased person."

How could the jury, in assessing the damages with reference to the injury to the widow and next of kin, *i. e.*, the deceased's family, do so without considering the members of the family? It is the injury to *them*, not to the deceased, that they are to consider, and how could that be done without knowing who they were and what they were? To illustrate: if the family of this workman consisted of children over twenty-one years of age, supporting themselves, receiving nothing whatever from the parent, but, on the contrary, contributing to his support, it is evident that the death of the parent would, in a pecuniary sense, be no injury to them whatever, but in point of fact an actual gain, since the parent's death relieves them of the expense of contributing to his support. The same damages, therefore, could not be assessed in such a case as would be assessable when the children are from three to thirteen years of age, entitled to and receiving a support from the parent, and with a reasonable expectation of continuing to receive such support until they become able to care for themselves; such children have a reasonable expectation that they will be housed, fed, clothed, and educated by their parent for a number of years to come. When, therefore, they are deprived of all these by the death of the parent, who in the case at bar was a healthy man in the prime of life and "intellectually bright," is not the *loss* to them greater than to those who have lost none of these things, and who had no reasonable expectation of receiv-

ing anything from the parent during the remainder of his life?

While it is sometimes true, as the counsel for defendant contends, that the pecuniary loss to a family by the death of a parent is neither increased nor diminished by the number of the family, yet it is not always true. A man's efforts to earn money are generally stimulated by the number of his family. If he has few children, there is not the same incentive to him to earn money as if he have many; and as the estimate of damages is to be based not only upon what he has earned, but what he might in the future have earned, it becomes important to know what his family is—"who they are and what they consist of"—in order that the jury may know what was the incentive of the man for earning money, and what expectations were disappointed by his death.

Again, to further illustrate this principle, we must consider that children in the station of life to which these children belonged, viz., to the working class, have a less expectation of receiving as many years of support from their parents as do children of more well-to-do persons; it becomes important, therefore, in assessing the damages, to know *how old* they are, for, as we have seen, a child of three years loses more in the death of the parent under such circumstances than a child of twenty years. So, again, the *health* of the family, and its number, is a proper subject for consideration, because if the only person pecuniarily injured by the death is, for instance, the widow, and she be in the last stages of consumption, liable to die within a month, the injury to her in loss of support is not as great as to one having an expectation of twenty years of life. We see, therefore, that it becomes not only necessary but highly important to consider "who and what the family consist of" in order to ascertain the

extent to which they have been injured. Hence the court was clearly right in its instruction.

But, after all, the question of the amount of damages, says this court in Ills. Cent. R.R. *v.* Barron (5 Wall. 90), "must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the case."

Surely, among the facts and circumstances of the case is "the family of the deceased—who they are and what they consist of."

It is also to be further observed (and it has an important bearing upon the exception, even if it be otherwise well-grounded) that evidence as to "who the family were and what they consisted of" was offered and received by the court without objection from the defendant (Rec., p. 6). It therefore cannot be a proper subject-matter of complaint by the defendant that the jury in considering the damages were instructed to consider evidence which was offered and which the defendant did not object to their receiving. In Penna. Co. *v.* Roy (102 U. S. 451), cited by defendant's counsel, the exception was *to the introduction* of the evidence complained of, and the opinion of the court was upon the propriety of its admission. In the case at bar the defendant waived the objection (if there be any) by consenting to the admission of the evidence, and he cannot, after thus consenting, object to the court telling the jury they may consider it.

FIFTEENTH EXCEPTION (Rec., p. 53).

The court in the language here excepted to is simply briefly summoning up what it has already said. The language contains several propositions of law, and the exception, if bad for no other reason, is obnoxious to the rule

laid down by the authorities heretofore cited to the effect that an exception will not lie to a series of propositions. See cases cited to brief on thirteenth exception; also to fourteenth exception.

On the whole case it is submitted that the trial was a fair one. The evidence shows such an exceedingly strong case for the plaintiff that the verdict would, in any event, have been against the defendant, and it is plain that it would be so again even if a new trial were granted.

"Error will not be ground for reversal if it appear to the court that the verdict must necessarily be the same on a new trial."

Douglass *v.* McAllister, 3 Cranch, 298.
Pence *v.* Langdon, 99 U. S. 578.

Seventh Assignment of Error.

This assignment complains of the judgment entered in the general term of the court affirming the judgment of the trial court (Rec. 40). Undoubtedly the judgment as entered shows a misprision of the clerk—a clearly clerical error which can be corrected at any time, and would have been corrected had the defendant called the court's attention to it. It is submitted that, until it is shown that the court below was applied to and refused to correct this error of its clerk, the defendant has no standing here to complain of it. The defendant claims that the judgment should have been affirmed for $8,000, if it was affirmed at all. The opinion of the general term contained in the record shows that the court affirmed the judgment of the trial court, which was for that sum, and this is all the plaintiff claims that the judgment of affirmance represents.

Interest as Damages for Delay.

By a recent ruling of this court (Wash. & Geo. R.R. Co. *v.* Harmon, 147 U. S. 571) it has been held that a judgment *in tort* does not bear interest in the District of Columbia. It will doubtless, however, be conceded that this is a great hardship upon a litigant—a hardship well illustrated by the case at bar. This judgment was rendered May 8, 1889. Five years and six months have elapsed since then, during which time the defendant, by using the process of appeal, *delays* the plaintiff in the fruition of his judgment and at the same time retains the use of $8,000 which the court and jury have awarded to the plaintiff, and which was payable *immediately*. The use of this $8,000 during these five and a half years at legal interest amounts to $2,840. To allow the defendant to reap a benefit from its conduct in thus *delaying* the plaintiff by wrongfully appealing and saving to itself over $2,800 is, we respectfully submit, to give the strongest encouragement to tortious wrong-doers to take appeals in all cases where an appeal lies; for, even if the judgment is affirmed, the defendant is a large gainer in the interest which it has escaped paying in the meantime. Is there any remedy for this? Can the practice of appealing judgments *in tort*, where one of the objects to be gained is the saving of interest for a number of years, be discouraged by any action of this honorable court? We respectfully and earnestly submit that this court possesses the remedy by the exercise of its power to award damages for delay where an appeal ought not to have been taken, and we ask that such sum as to the court may seem proper may be awarded *as damages for delay* in addition to the affirmance of the judgment. In Schell *v.* Cochran (17 Otto, 625) the right of this court to award damages for delay was recognized in a case somewhat of the na-

ture of the case at bar in respect of loss of interest. There a judgment had been recovered against a collector of customs in New York for moneys excessively exacted by him on entries at the custom-house. This court, on affirming the judgment, awarded interest, and thereupon the solicitor general representing the United States, on behalf of Schell, moved to correct the judgment and mandate by striking out the direction as to interest on the ground that the suit was practically against the Government and the Government ought not to pay interest; but the court, refusing to do so, said:

"Such interest for the time a writ of error is pending is really damages for delay. * * * Where there is a judgment and a certificate of probable cause and thus a case for payment out of the Treasury under section 989, and then, by the direction of the Government, a writ of error is taken which operates as a stay, interest on the judgment during the stay ought to be allowed."

It is true the court said that interest was allowed under rule 23 of the court, but it is submitted it might, for as cogent reasons, have been allowed under the statute which declares:

"Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the defendant in error just damages for his delay, and single or double costs at its discretion" (Rev. Stats. 1010).

It will be noted that the statute differs somewhat in its language from the rule of this court. In the rule the language is "merely for delay," but in the statute the word "delay" is not so qualified. So that it is a fair interpretation of it to say that whenever there has been delay and it would be "just" to award damages for such

delay, the court may do so under the provision of a statute which directs that "the court shall adjudge to the defendant in error *just* damages for his delay." In West Wisc. R.R. *v.* Foley (94 U. S. 100) this court, through its Chief Justice, said:

"*All is left to the judicial discretion of the court*, and this is true as well as to the amount as to the propriety of giving any at all. This being so, we think the rule may fairly be construed as limiting the amount beyond which we cannot go, but as leaving us at liberty to give less than the full sum [ten per cent.] in cases where in our judgment *the circumstances are such as to make it proper to do so*. An inflexible rule, requiring us to award a certain specified amount or none at all, would oftentimes operate to defeat itself. The object is to discourage frivolous appeals *as well as to compensate to some extent for the loss which results from delay*."

We do not say that the suing out the writ of error in this case was frivolous, but we do say that the long *delay* which would result from that act was well known to the defendant, and it was well known that even if the judgment were affirmed the *delay* would be to it a positive and large financial gain, and an equally positive and certain financial loss to the plaintiff. The costs incurred by suing out the writ are a mere cipher compared to the immense saving of interest, amounting in this case, as we have shown, to $2,840. On the other hand, if the court shall award this sum as "damages for the delay" suffered by the plaintiff, the defendant will pay nothing more than in fairness and justice it should pay, and the plaintiff receive nothing more than he ought justly to receive.

Respectfully submitted.

FRANKLIN H. MACKEY,
P. P.

15-1-94.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 146.

PULLMAN'S PALACE CAR COMPANY, PLAINTIFF IN ERROR,

vs.

THE METROPOLITAN STREET RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA, *set:*

To Metropolitan Street Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein The Pullman's Palace Car Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John F. Philips, judge of the circuit court of the United States for the western division of the western district of Missouri, this 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-one.

JNO. F. PHILIPS, *Judge.*

2 [Endorsed:] United States circuit court, western district of Missouri, western division. Pullman's Palace Car Co. *vs.* Metropolitan Street Railway Co. Citation.

UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, }

We hereby acknowledge due service of the within citation this 18th day of April, A. D. 1891.

PRATT, FERRY & HAGERMAN,
Attorneys for Defendant in Error.

3 *Assignment of Errors.*

Comes now the said Pullman's Palace Car Company, by John S. Runnells, William Burry, and Gardiner Lathrop, its attorneys, and says that in the record and proceedings in this cause there is manifest error, in this, to wit:

1. The circuit court erred in not holding the inspection of the cars made by defendant at the plaintiff's works final and binding upon it and conclusive of the fact that the cars were made in accordance with the contract.

2. The circuit court erred in not holding that the defendant, by its president's letter of April 11th, 1888, elected to retain the cars and make or have made any necessary changes, and that defendant could not thereafter change its purpose and rescind the contract.

3. The circuit court erred in not holding that defendant waived the right to rescind the contract, if any such right existed, by the letter of defendant's president of April 11th, 1888, in which it said that it would have changes made in the cars.

4 4. The circuit court erred in not holding that defendant, on the undisputed facts in the case, elected to keep the cars and to make or have made any changes or alterations necessary.

5. The circuit court erred in not holding that the defendant had waived any right it might have had to rescind the contract by the way in which it dealt with and used the cars.

6. The circuit court erred in not holding that the use of the cars on defendant's road and the collection and retention of fares from passengers was a waiver of any right it might have had to rescind the contract and return the cars to plaintiff.

7. The circuit court erred in not holding that the defendant did not elect to rescind or put itself in position to refuse to pay the contract price for the cars, because it did not return the cars to plaintiff at its works in Pullman, Illinois.

8. The circuit court erred in holding that there was any implied warranty in the contract for the building of the cars that they would be well fitted for or adapted to any particular road, grades, or curves.

5 9. The circuit court erred in allowing defendant to introduce evidence to vary or modify the terms of the written contract between the parties.

10. The circuit court erred in not entering judgment for plaintiff for the contract price of the cars, for the extras ordered by defendant, and for interest.

6 11. During the offering in evidence by defendant of certain letters the plaintiff interposed an objection against the admission of any testimony tending to show or relating to the condition of the cars and their construction after their delivery to defendant, for the reason that all defects were waived by the inspection made, and that the duty of defendant was fully performed at the time of that inspection; and during the examination of the witness Charles F. Morse the admission of the same character of evidence was objected to by plaintiff; but the court overruled the objection of complainant and permitted testimony to be introduced tending to show that when the cars were taken to Kansas City and put upon defendant's tracks it was found that the brakes were made after a defective design, were defectively constructed, and did not in their operation control the stopping and starting of the cars in a proper manner; which ruling of the court is now assigned as error.

12. The circuit court erred in that during the testimony of the witness Lawless it refused to allow plaintiff to prove what would have been the cost per car to remedy the defect in the brakes claimed by defendant to exist, if it did exist; to which ruling of the court plaintiff excepted.

13. During the examination of the witness Gillham plaintiff objected to the introduction of any testimony on the point of whether or not an examination or inspection at the shops of the manufacturer would disclose the fact that the brakes on the

7 cars would or would not work on the curves and grades of defendant's line of road. The objection was overruled by

the court and an exception taken by plaintiff; and thereupon the court admitted testimony offered by defendant tending to show that the defect in the brakes alleged by defendant was a defect which could not be ascertained by an inspection or in any other way than by a trial upon the road; which ruling of the court is assigned as error.

14. During the examination of the witness Brown plaintiff offered to prove by him that the clause in the contract between the parties in regard to the inspection and acceptance at plaintiff's works was universally exacted by the plaintiff in contracts for the manufacture of cars; that it would not accept a contract unless that condition was inserted, and that the object and purpose of it is that the buyer may make a thorough and critical inspection of the cars at the plaintiff's shops to ascertain if they comply with the contract, in order that any defects pointed out may be remedied at the plaintiff's car shops, where they have their workmen and all facilities for completing the contract; but the court refused to allow any such evidence; to which ruling of the court plaintiff excepted, and which ruling of the court is now assigned as error.

15. During the examination of the witness Brown the witness was asked why it was that inspection certificates and receipts were sent to the defendant for signature after the inspection alleged by plaintiff had been made at its works. He was also asked if so sending the receipts afterwards contemplated an additional inspection of the cars, and counsel asked leave to ask the witness whether sending such certificates and receipts after the delivery of the cars was for the purpose of having an additional inspection made or for the purpose of having plaintiff's records completed; but the court sustained defendant's objection to all of such testimony and refused to allow the plaintiff to introduce evidence on those points; to which ruling of the court plaintiff objected, and which ruling of the court is now assigned as error.

16. During the examination of the witness Sessions, when recalled, plaintiff offered to prove by him that the cost of changing the brakes — by defendant to be defective to others which defendant said worked well would have been from $75 to $100 per car; but the court refused to allow such testimony; to which ruling plaintiff excepted, and which ruling of the court is now assigned as error.

17. The circuit court erred in refusing to add to its first finding, that the plaintiff "had only built two combination cars for use on a street cable railway prior to building the twenty-five combination cars for defendant," which fact is shown by uncontradicted evidence in the record.

18. The circuit court erred in not adding to its 6th finding the following: "While there he did not go over the 12th-street line and did not examine or observe its curves, grades, or construction; he was not a civil engineer and knew nothing about such matters, and was not told anything about them;" which facts are shown by undisputed testimony and are material in the case.

19. The circuit court erred in inserting the first sentence of the

7th finding made by it, which is: "While in Kansas City said Pullman was on the ground, and whilst not going over the line of track had a general knowledge of the grades and curves thereof," for the reason that there was no evidence whatsoever introduced to sustain said finding.

20. The circuit court erred in inserting the following sentence in the 9th finding made by it: "He was at the office of defendant's engineer for some time and had access to the plans and profiles of the road," because the same is not supported by any evidence in the case.

21. The circuit court erred in inserting the following clause in the 9th finding: "and while in Kansas City the following specifications were submitted by defendant's engineers," in that uncontradicted evidence shows that the specifications were not submitted by defendant's engineers, but were dictated by them.

10 22. The circuit court erred in making its 10th finding of fact, which is as follows:

"Thereafter plaintiff proceeded with the construction of the cars. The defendant gave no direction in relation to the brakes on the cars otherwise than that they should be extra heavy and extra powerful, nor were any plans or specifications of brakes furnished to the defendant during their construction. The brake put upon these cars was designed and constructed by Mr. Twyman, plaintiff's engineer,"

In that the finding as so made is not supported by any testimony whatsoever; and the court further erred in not making, in place of said finding of fact, the following finding of fact, which was prepared and submitted to it on the part of plaintiff and which is founded upon uncontradicted testimony in the record:

"Plaintiff then proceeded with the construction of the cars. Defendant's engineers went to plaintiff's works while the cars were being constructed and directed several alterations to be made, found fault with the brakes as then in process of construction, and gave orders for changes in them. It was after one of these visits that the above additional specifications were sent plaintiff."

11 23. The circuit court erred in not inserting in the 11th finding of facts the following sentence: "Tests were made with chisels, &c., as to the distance the brake hung from the wheels and how quickly and efficiently the power could be applied," which is supported by uncontradicted testimony in the case and which plaintiff requested be inserted in the findings of fact.

24. The circuit court erred in not adding, at the end of the 13th finding of fact made by it, that the trouble about the 30-foot-radius curve was promptly remedied, and that no objection was made to the cars on account thereof on the trial of the case, which is shown by uncontradicted testimony in the case and was admitted by defendant's counsel on the trial of the case.

12 25. The circuit court erred in making the 16th finding of fact, which is as follows:

"The cars could not be operated successfully on defendant's railroad track, for which they were designed, with this brake, nor upon

similar lines; and this defect or inability in the brake was *was* not apparent nor discoverable upon any reasonable inspection made at the place of their manufacture, and could not be discovered without a practical test on the defendant's railroad track or over like track. The defect in the brake was a latent one, which did not and could not develope to the observation on inspection, and was only discoverable when put into use on the defendant's track or similar track," for the reason that this finding is not supported by any competent evidence in the case, and for the further reason that the character of the defect claimed to exist in the brakes is of such a nature that, if it exists, it must necessarily have been discoverable on a proper inspection.

26. The circuit court erred in making the 20th finding of fact, which is as follows:

"The defendant did not use and operate the cars in question longer than was reasonably necessary to ascertain whether they could be successfully operated with the brake furnished therewith," for the reason that said finding of fact is not supported by any testimony whatsoever in the case.

13 27. The court below erred in making the 21st finding of fact, which is as follows:

"During the time defendant run the cars on its road, during the tests made as hereinbefore found, passengers were received thereon and fares collected from them by defendant. The successful running of the trains was frequently interrupted by breaking of the cable and the locking of the car wheels in consequence of the defective construction of the brakes, and defendant so continued in the attempt to run said cars during the time of plaintiff's promises to repair the alleged defect and on such trips received on board of such cars passengers and collected from them the customary fare. On the trial defendant offered to prove that owing to the insufficiency of the brakes the cars were run at loss and that no profit resulted from collection of fares. On plaintiff's objection, this testimony was by the court excluded," in that the last two sentences thereof, beginning with the words "On the trial defendant offered," *is* not *a* proper matter to be inserted in a finding of fact.

14 28. The circuit court erred in not inserting in the findings of fact the following findings, which it was duly requested to do and which were material in the case and shown by uncontradicted evidence introduced on the trial:

a. Defendant had a firm of civil engineers in charge of the construction of the road. They were engineers of good standing, had had much experience in building cable street railway, and one of them was devoting most of his time to the personal supervision of defendant's line of road then in process of construction. These engineers had carefully examined the road, and ascertained the grades and curves thereon, and had made profile maps of it, and were thoroughly familiar with every part of it.

b. All facilities for inspection that were asked for by defendant's superintendent were accorded him. No complaint is made by de-

fendant of any fault in the construction of the cars that its inspector could not then have ascertained, and the contract required inspection and acceptance at plaintiff's works.

e. At that inspection defendant's superintendent suggested that the brake-lever was too far away from the gripman, so that when standing at his grip he would have to take two steps to get to the brake-lever. Defendant's superintendent directed that this be changed by bending the brake-lever. The change was made in all the cars at Chicago, before they were shipped. Afterwards, when the cars reached Kansas City, defendant changed the brake-lever back again to the original position.

d. Defendant continued to use the cars in the regular operation of its road, deriving revenue therefrom, for one month, or until May 10th, when it discontinued the use of the cars, and notified plaintiff that the cars were subject to its order. Plaintiff refused to receive the cars back, demanded the contract price for them, and also demanded pay for certain extras.

15 *c.* The cars were made upon specifications upon which defendant's officers had the right to finally pass, and they exercised that right. Plaintiff knew nothing whatsoever about the road, its curves or grades, and was not skilled in the operation of such a road. Defendant knew all about the road, its curves and grades, and its officers and engineers were skilled in the operation and construction of such roads. Defendant did not in any way rely upon plaintiff to make cars proper and fit to be operated upon its road, but depended entirely upon the specifications.

f. There was no representation by plaintiff that the cars would be fit for operation upon defendant's line of road, or that the brakes put upon it would be equal to controlling such heavy cars upon such steep grades.

g. No breach of the contract is insisted upon by the defendant, and no fault is found with the cars, and no departure from the specifications in the building of the same is alleged, except that it claims that the brakes would not properly work upon its steep grades and sharp curves, and that there was an implied warranty in the contract on the part of plaintiff that the cars would work satisfactorily on defendant's line of road.

h. Defendant's superintendent, at the time of ordering the cars, insisted that under the specifications the cars would be heavy and unmanageable, and that they ought to be made much lighter and smaller, but its president and engineer insisted on having them made in the way in which they were built. When the defendant took the combination cars off its road on May 10, it put in their places certain other cars which it had ordered much smaller, narrower and lighter.

i. During the month in which the combination cars were operated, it appeared that they were too heavy to be properly managed upon the grades on defendant's road; that they were so wide that they came dangerously close when passing each other; that one or two accidents had occurred therefrom, and that one of the parties so injured had been paid by defendant for his injuries. The cars

were ordered, and made too large and heavy for operation upon such a line of road as defendant's. They were, however, in these respects, in exact conformity with the contract and specifications under which they were built. The defendant removed them from its road because it found them too heavy and large to be properly managed, and substituted in their place lighter cars more easily managed.

16 *j.* Defendant waived any right of re-cis-ion by using the cars for one month, until it could obtain the other lighter cars. The defect about brakes, if there was any, could have been ascertained upon a proper inspection. It certainly did not require a month to find it out. The reason, however, that the cars proved unmanageable was on account of the heavy grades on defendant's road, of which the plaintiff was ignorant at the time of making the contract for the building of the cars, and of which defendant was well aware.

k. Defendant does not claim any recoupment or damages on account of defects in the cars, but claims the right of re-cis-ion and of returning the cars. By its letter of April 11, 1888, it elected, not to rescind but to keep the cars and have alterations made or defects cured either by the plaintiff or by itself.

l. The plaintiff never in any way waived the provision of the contract concerning inspection and acceptance of the cars at its works. Its action in sending inspection certificates and receipts to defendant for signature was only done to keep its records in proper shape.

m. Defendant attempted to repair the brakes and thus waived its right of rescission.

n. Defendant never returned or offered to return the fares which it collected.

o. Defendant never returned or offered to return the cars to Pullman Junction or Kensington, the place where they were delivered.

17 *p.* There is no evidence that plaintiff ever assented to a modification of the original contract as to inspection and acceptance of the cars at its works.

q. There is no evidence of any consideration passing between the plaintiff and defendant for the alleged modification of the original contract as to inspection and acceptance of the cars at its works.

18 29. The circuit court erred in declaring the law of the case to be—

"That the defendant had the legal right to rescind the contract for the purchase of said cars in the time and manner set out in the foregoing special finding of facts, and that the defendant rescinded said contract in accordance with its legal right so to do and made a lawful tender of said cars to the plaintiff, and is not liable to the plaintiff for the contract price of said cars or any other sum, and that the defendant is entitled to recover from the said plaintiff the freight and drayage on said cars from Chicago to Kansas City,

amounting to the sum of one thousand and eighty-eight and $\frac{50}{100}$ dollars, for which judgment will be entered."

30. The circuit court erred in refusing, when requested by plaintiff, to declare the law of the case to be with the plaintiff, and that the plaintiff was in law, upon the finding of facts made, entitled to recover from the defendant the contract price for said cars with interest.

31. The circuit court erred in not holding, as requested by plaintiff, that plaintiff never assented that the place for final inspection and acceptance of the cars should be changed from its works to Kansas City; that under the contract between plaintiff and defendant the inspection provided for covered the brakes as well as every other part of the cars; that the inspection provided for in the contract covered all defects, latent as well as patent; that under the contract the title to the cars vested in defendant as soon as the cars were inspected and delivered free on board at Pullman Junction
or Kensington, Ills., and defendant became indebted to
19 plaintiff for the contract price; that it required a new consideration to support a change in that contract, and no such new consideration is shown; that the inspection and acceptance provided for in the contract prevented any agreement by implication that the cars would be fitted for use on any particular line; that no right was reserved in the contract to make a test on defendant's line; that the collection and retention of fares from passengers while the cars were used by defendant without any offer by defendant to return said fares or turn them over to plaintiff prevents defendant from attempting any re-cission of the contract, and that defendant cannot treat the contract as rescinded, as it has not returned the cars to plaintiff at its works or offered to do so.

32. The circuit court erred in refusing to adopt and hold the declarations of law and each of them asked by plaintiff.

And the said Pullman's Palace Car Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

JOHN S. RUNNELLS,
WILLIAM BURRY,
GARDINER LATHROP,
Att'ys for Plaintiff in Error.

20 [Endorsed:] No. 1437. Pullman's Palace Car Company *vs.* Metropolitan Street Railway Company. Assignment of errors. Filed April 2, 1894. Warren Watson, clerk.

21 UNITED STATES OF AMERICA, *set:*

The President of the United States to the judge of the circuit court of the United States for the western division of the western district of Missouri, Greeting:

Because in the records and proceedings and also in the rendition of a judgment of a plea which is in the said circuit court, before you,

between The Pullman's Palace Car Company and The Metropolitan Street Railway Company, a manifest error hath happened, to the great damage of the said The Pullman's Palace Car Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the second day of May next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Seal of the United States Circuit Court for the Western District of Missouri, Western Division.

Issued at office, in Kansas City, this 2nd day of April, A. D. 1891.

WARREN WATSON, *Clerk*,
By —— ——, *D. C.*

Approved:
JNO. F. PHILLIPS.

22 [Endorsed:] United States circuit court, western district of Missouri, western division. Pullman's Palace Car Co. *vs.* Metrop. St. R'y Co. Writ of error.

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *set:*

I do hereby return due and perfect obedience to the writ, and do herewith, under the seal of said circuit court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk and the seal of said court.

Issued at office, in Kansas City, this 16th day of April, A. D. 1891.

WARREN WATSON, *Clerk*,
By —— ——, *Deputy Clerk.*

23 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

UNITED STATES OF AMERICA, *set:*

Be it remembered that heretofore, to wit, on the 30th day of June, A. D. 1888, there was filed in the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri a petition in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

In the Circuit Court of the United States for the Western District of Missouri, Western Division, to the October Term, A. D. 1888.

PULLMAN'S PALACE CAR COMPANY, Plaintiff, }
vs. } Law.
THE METROPOLITAN STREET RAILWAY CO., Defendant. }

First. The plaintiff respectfully shows to the court that it is a corporation organized and existing under and by virtue of the laws of the State of Illinois and a citizen of Illinois, and that the defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri and a citizen of Missouri, having its principal place of business in Kansas City, in the western division of said western district of Missouri.

In the month of June, A. D. 1887, said defendant entered into a contract in writing with plaintiff; which contract, together with the general specifications referred to therein and made a part thereof, *are* in words and figures following:

24 *Agreement.*

CHICAGO, ILLS., *June 14th*, 1887.

Metropolitan Street Railway Company, Kansas City, Mo.

GENTLEMEN: Pullman's Palace Car Company will build for the Metropolitan Street Railway Company twenty-five (25) combination closed and open cable cars, as per general specifications attached hereto and made a part of this agreement, and deliver the same f. o. b. Pullman Junction or Kensington, Ills., on or before October 10th, 1887, delays by fires, strikes, and unavoidable hindrances excepted, for the sum of two thousand ($2,000.00) dollars each.

Terms, cash on deliveries.

Cars to be inspected and accepted at our works.

Your written acceptance hereof will constitute a contract mutually binding upon both companies.

(Executed in duplicate.)

PULLMAN'S PALACE CAR COMPANY,
By GEO. F. BROWN, *General Manager.*

Accepted June 27, 1887.

METROPOLITAN STREET RAILWAY COMPANY,
By KNIGHT & BONTECOU, *Chf Eng'rs.*

Pullman's Palace Car Company, Pullman Car Works.

PULLMAN, ILL., *June* 14, 1887.

General Specifications

25 For twenty-five (25) combination cars, lot —, plan 510, for account of Metropolitan Street R'y Co.

Ground plan.... } Length, 34′ 9″ over all; width, 6′ 6″ or more over sills.
Framing..... } Height from top of sill to under plate, —.
Flooring..... } Pullman st'd.
Style of outside.. } Number of windows each side, 8.
Roof..... } " " " end, 2.
Hood.....

Window sash, cherry.
Glass, D. T. French. Size—lower, —; upper, —.
" in clear story, embossed. Size, —.
" " doors, D. T. French. Size—lower, —; upper, —.
Blinds, cherry frames, basswood slats.
Ceiling, mahogany; decoration, —.
Inside finish, same as 16′ cars recently built.
Seat ends, paneled; malleable handles. Seating capacity, —.
Seats and backs, same as 16′ cars recently built.
Seat and back springs, —.
" " covering, Wilton plush carpet.
Trimmings, bronze. Basket racks, —.
Lamps, centre: 2 in closed part & 1 in open.
" bracket, none.
Water cooler, "
Heater, "
Saloons, "
Locks, "
Body colors, same as 16′ cars recently built.
Decoration, suitable design.
Lettering, —.
Numbers, from 200 to 224, inclusive.
26 Names, —— ——.
Platforms, 3′ 9″, per sketch, with one gate on left-hand side.
Height from top of rail to centre of drawbar, —.
Colors, same as 16′ cars recently built.
Drawer springs, —; buffer springs, —.
Brakes to be operated by gripman with lever, both trucks.
Brake-power, —.
Sand-boxes to be applied on front truck at centre.
Trucks, Pullman st'd for cable cars.
Gauge, 4′ 8½″.
Wheel base of truck—rear truck, 4′ 0″; front truck, short as possible to admit grip.
Colors, —.
Wheels, Fulton foundry.

Axles, 3½″ iron.
Springs, bolster, —; pilot on front truck.
" equalizer, Vose.
Pedestals, Bemis; wire guards on side.
Oil-boxes, "
Oil-box lids, "
Brake-shoes, Congdon flange.
Journal bearings, Bemis.

REMARKS.—Extra brakes on rear truck operated by brake-mast, with wheel at rear-end platform.
Plans to be sent for approval Met. Co.'s eng'r.

Thereupon plaintiff built the twenty-five (25) street cars described in said contract, of good material and in a good and workmanlike manner and in all respects according to the terms of said con-
27 tract, except certain minor changes made at the request of defendant and hereinafter more particularly set forth. All of said cars, as the same were from time to time completed, were inspected and accepted by defendant at plaintiff's works and were thereupon delivered to defendant at such times and places as were specified in said contract or as were acceptable to said defendant.

As said cars were from time to time delivered to defendant it became its duty to pay plaintiff therefor the sum of two thousand dollars ($2,000) for each car, as specified in said contract, but defendant, although often requested, refused, and still does refuse, to pay plaintiff the sum of money so agreed upon as the price of said cars, and now is indebted to plaintiff in the sum of fifty thousand dollars ($50,000), with interest thereon from March 14th, 1888.

Second. For a further cause of action plaintiff says that while said twenty-five (25) cars were in process of building defendant requested plaintiff to make certain changes in the construction thereof from the construction called for by the specifications attached to said contract of June, 1887, and to add to said twenty-five (25) cars certain things not provided for or called for in and by said contract and specifications thereto attached, agreeing to pay therefor, which changes and extras, together with the reasonable cost thereof, were as follows:

For excess in cost of cross-seats put in said cars at request of defendant instead of longitudinal seats, as provided for in said contract, at $126.50 per car.....	$3,162 50
For furnishing and applying one gong to each of said twenty-five cars.....	196 02
28 For furnishing and applying two extra reliable sand-boxes to each of said twenty-five cars, including freight on said sand-boxes from Boston..	754 97
For renumbering eleven of said cars, the numbers thereof having been changed by the direction of defendant after the numbers had been painted on said cars by plaintiff.....	39 75
Total	$4,153 24

But defendant, although often requested, refused, and still does refuse, to pay to plaintiff said last-mentioned sum of money, and now is indebted to plaintiff in the sum of four thousand one hundred and fifty-three dollars and twenty-four cents ($4,153.24), with interest thereon from March 14th, 1888.

Third. For a further cause of action plaintiff says that the said twenty-five (25) cars were to be delivered to defendant free on board cars at its works, at Pullman, Illinois, and defendant requested plaintiff to ship the same by the Chicago & Alton railway; that in order to ship said twenty-five (25) cars by said railway it was necessary for plaintiff to advance thereon the sum of two dollars and fifty cents ($2.50) per car for having the railway cars on which said street cars were loaded transferred to the Chicago & Alton railway, which switching charges, amounting in all to the sum of sixty-two dollars and fifty cents ($62.50), plaintiff paid at the request and on behalf of defendant, but defendant, although often requested, refused, and still does refuse, to pay to plaintiff said last-mentioned sum of money, and now is indebted to plaintiff in the sum of sixty-two dollars and fifty cents ($62.50), with interest thereon from March 14th, 1888.

29 Fourth. For a further cause of action plaintiff shows that on or about March 14th, 1888, it shipped to defendant at Kansas City aforesaid, at the request of defendant, six small metal wheels, which were then worth the sum of three dollars and ninety-six cents ($3.96) and for which defendant agreed to pay upon the receipt thereof; but defendant, although often requested, refused, and still does refuse, to pay to plaintiff said last-mentioned sum of money, and now is indebted to plaintiff in the sum of three dollars and ninety-six cents ($3.96), with interest thereon from March 14th, 1888.

Wherefore plaintiff prays judgment against defendant for the sum of fifty-four thousand two hundred and nineteen dollars and seventy cents ($54,219.70), with interest thereon from March 14th, A. D. 1888.

PULLMAN'S PALACE CAR COMPANY,
By ALFRED ENNIS AND
WM. BURRY, *Its Attorneys.*

Thereupon, upon the filing of said petition, a writ of summons was issued out of the office of the clerk of said court; which said writ, together with the return of service of the marshal endorsed thereon, is as follows, to wit:

UNITED STATES OF AMERICA, }
Western Division of the Western District of Missouri, } *set:*

The President of the United States of America to the marshal of the United States for the western district of Missouri, Greeting:

You are hereby commanded to summon the Metropolitan Street Railway Company, a citizen of the State of Missouri and a
30 resident of the western division of the western district thereof, to be and appear before the honorable circuit court of the

United States in and for the western division of the western district of Missouri on the first day of the next term thereof, to be begun and holden at the city of Kansas, in said district, on the third Monday, the 15th day, of Oct. next, then and there to answer the complaint of Pullman's Palace Car Company, a citizen of the State of Illinois, as set forth in the petition filed in the office of the clerk of said court on the 30 day of June, A. D. one thousand eight hundred and eighty-eight. Hereof fail not and have you then and there this writ.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, the 30 day of June, A. D. eighteen hundred and eighty-eight. Issued at office, in the city of Kansas, in said district, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] WARREN WATSON, *Clerk*,
By A. UTTER, *Deputy Clerk*.

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, } *set:*

I do hereby certify that I served the within writ by delivering a true copy thereof, together with a true copy of the petition in the cause, to C. F. Morse, president of the Met. St. R'y Co., at his office, in Kansas —, Mo. Done in the western division of the western district of Mo. this 30th day of June, 1888.

ELIJAH GATES,
United States Marshal,
By D. MALLOY, *Deputy*.

31 And afterwards, at the regular March term, 1889, of said court and on the 5th day of March, 1889, the following entry appears of record in said cause, to wit:

PULLMAN'S PALACE CAR COMPANY } No. 1437.
against
METROPOLITAN STREET RAILWAY CO. }

This day comes defendant, by attorneys, and files answer and counter-claim.

Said answer and counter-claim so filed as aforesaid is in words and figures as follows, to wit:

In the Circuit Court of the United States, Western Division of the Western District of Missouri, at Kansas City.

PULLMAN'S PALACE CAR COMPANY, Complainant, } No. 1437.
vs.
METROPOLITAN STREET RAILWAY COMPANY, Defendant. }

Answer and Counter-claim.

Now comes defendant and for its answer and counter-claim to the petition of the plaintiff avers:

I.

Defendant denies each and every allegation in each and every count in the petition contained.

Wherefore defendant asks to be dismissed with costs.

II.

Defendant, for further separate answer to the second count of the petition, avers that heretofore plaintiff was under a certain contract manufacturing, constructing, and building twenty-five
32 cars for defendant, and while so engaged defendant insisted on having cross-seats put in same, but defendant avers that this was neither extra work nor a change in the contract, but that such work was contemplated and undertaken by a contract to build said cars, and defendant shows that after undertaking such contract plaintiff endeavored to have defendant consent to having longitudinal instead of cross seats put in said cars, which consent defendant refused to give; thereupon plaintiff notified defendant that if cross-seats, covered by plush, were put in an extra charge would be made. Defendant at once notified plaintiff that before the time the contract to build the cars was left to plaintiff one Charles Pullman, a representative of plaintiff, understood that cross-seats were desired in these cars, whereupon plaintiff agreed to carry out such understanding with said Pullman, if had, and that if said Pullman did so understand the matter or did agree that cross-seats should be put in that no extra charge would be made for putting in cross-seats, but that any demand therefor would be released and discharged.

Defendant avers that said Charles Pullman did so understand the matter and did so agree, whereby any claim, if any, for extra work as to such matter was released and abandoned. Defendant avers that cross-seats were put in said cars, but same were not covered with plush.

Defendant denies each and every allegation in the said second count contained; wherefore defendant demands judgment on the second count.

III.

Defendant for further answer avers:

Plaintiff is a corporation engaged, among other things, in the manufacture and construction of different kinds of cars, in-
33 cluding cars for use and operation upon street cable-car lines, together with the different appliances in connection with the same.

Plaintiff was at the time of the grievances hereinafter complained of so engaged, and the place of construction and manufacture aforesaid was in Cook county, Illinois, many hundreds of miles away from Kansas City, Missouri.

That the defendant at the time of the grievances hereinafter complained of was a corporation engaged in the construction and operation of different lines of street railway in Kansas City, Missouri. Prior to June 14, 1887, defendant was the owner of a line of street

railway in said city known as the "Twelfth-street line," which it desired to operate by means of an endless cable and upon which it was necessary to operate what were known as cable cars.

That upon said line there were many curves and heavy grades.

Prior to June 14, 1887, the plaintiff, knowing of the condition of said line and all about its curves and grades, and with knowledge of what was necessary to be done in manufacturing and constructing cable cars in all respects sufficient for the purposes of use as cable street cars upon that particular line, on June 14, 1887, entered into a contract with defendant whereby plaintiff undertook and agreed to build for defendant twenty-five combination closed and open cable cars, with all the necessary conveniences, appliances, and appendages for use as street cars upon the line of defendant in Kansas City, Missouri, known as the "Twelfth-street line," and for no other purpose, which cars were to be fit for such use and purpose and free from any latent defect, and plaintiff agreed to deliver said cars on or before October 10, 1887, for such use and purpose.

By the terms of such contract as originally made the cars
34 were to be delivered free on board of cars at Pullman or Kensington, Illinois, and by the terms of such contract defendant was to pay two thousand dollars for each of said cars, to be paid in cash on delivery. Said contract when made provided that the cars were to be inspected and accepted at the works of plaintiff, in Pullman, Illinois. Attached to said contract were some general specifications covering general directions as to part of the work to be done by plaintiff, but not covering all of the work to be done nor the details as to how the work was to be done, which was left to the superior judgment and knowledge of the plaintiff.

Afterwards said contract was, by mutual consent of the parties, modified and changed in the following respects:

The cars were not to be paid for on delivery. Said cars were to be delivered at Kansas City, Missouri, and tested by defendants before acceptance. The provisions as to acceptance and inspection at the works of plaintiff *was* abandoned and set aside. Additional specifications were agreed upon. Afterwards, and long after the time agreed upon for delivery, plaintiff did send twenty-five cars to defendant at Kansas City, Missouri, for test and inspection. Said cars were there tested by defendant and found to be and were, in fact, insufficient for the purposes for which they were sold. They were unfit and improper for use as street cars upon the said Twelfth-street line. There were latent defects in said cars and appliances; among others, improper and insufficient brake appliances, improper and insufficient wheel trucks and cars. The cars were of too great weight to be operated over the curves and grades upon said line. Thereupon defendant notified plaintiff that said cars were so defective, and attempted to make said cars fit and proper for the use
for which they were sold and free from said latent defects, but
35 wholly failed to do so; that said cars were worthless to this defendant, and it refused to receive and accept said cars, and long prior to the institution of this suit tendered them back to plaintiff, who refused to receive them, whereupon defendant stowed them

in a safe place, subject to plaintiff's order, and so notified plaintiff. Defendant refused to use said cars, and after testing them refused to receive them.

Defendant denies each allegation of the petition not herein admitted; wherefore defendant asks to be dismissed with costs and for such other relief as is proper.

IV.

Defendant for further answer and counter-claim says:

It reavers each allegation of paragraph III of this answer the same as if specifically set forth herein.

By reason of said cars being unfit and improper for the use for which they were to be furnished, by reason of the latent defects aforesaid, by reason of the failure to build said cars within the time agreed, and by reason of each of such facts defendant has been damaged in the sum of seventy-five thousand dollars. Among other things, there was a large loss of business and a large loss of profits in street-car traffic. There was a loss of the use of the line of road. There was a large expense incurred in the employment of servants, agents, and employees to work on and about the line. Much time was lost; time of employees was lost; cable, ropes, and appliances were damaged; the road-bed was injured; the tracks were injured; great expense was incurred in obtaining, looking after, and purchasing other cars; but it is not intended to ex-
36 clude by this enumeration the general damages not necessary to be specially pleaded. Said damages are due and wholly unpaid.

Wherefore defendant pleads this its counter-claim and asks judgment for seventy-five thousand dollars and costs.

PRATT, McCRARY, FERRY & HAGERMAN,
Attorneys for Defendant.

And afterwards, at said March term, 1889, of said court and on the 24th day of April, 1889, the following further entry appears of record in said cause, to wit:

PULLMAN'S PALACE CAR CO. *ag'st* METROPOLITAN STREET RAILWAY CO. } 1437.

This day come the parties, by their attorneys—the plaintiff by William Burry, J. T. Runnells, and Gardiner Lathrop and the defendant by Pratt, McCrary, Ferry & Hagerman. Thereupon this cause is regularly called for trial, and, a jury having been waived, the hearing is proceeded with before the court, and the hearing not being concluded at the hour of adjournment further proceedings are postponed till tomorrow morning. Amended answer and reply filed by leave.

The said amended answer so filed is in words and figures as follows, to wit:

In the Circuit Court of the United States, Western Division of the Western District of Missouri, at Kansas City.

PULLMAN'S PALACE CAR COMPANY, Plaintiff,
vs.
METROPOLITAN STREET RAILWAY COMPANY, Defendant. } No. 1437.

Amended Answer and Counter-claim.

37 Now comes defendant and, for its amended answer and counter-claim to the petition of the plaintiff, says:

I.

Defendant denies each and every allegation in each and every count in the petition contained.

Wherefore defendant asks to be dismissed with costs.

II.

Defendant, for further amended answer to the second count of the petition, avers that heretofore plaintiff was under a certain contract manufacturing, constructing, and building twenty-five cars for defendant, and while so engaged defendant insisted upon having cross-seats put in same, but defendant avers that this was neither extra work nor a change in the contract, but that such work was contemplated and undertaken by a contract to build said cars, and defendant shows that after undertaking such contract plaintiff endeavored to have defendant consent to having longitudinal instead of cross seats put in said cars, which consent defendant refused to give. Thereupon plaintiff notified defendant that if cross-seats, covered with plush, were put in an extra charge would be made. Defendant at once notified plaintiff that before the time the contract to build the cars was let to plaintiff one Charles Pullman, a representative of plaintiff, understood that cross-seats were desired in these cars; whereupon plaintiff agreed to carry out such understanding with said Pullman, if had, and that if said Pullman did so understand the matter or did agree that cross-seats should be put in that no extra charge would be made for putting in the cross-seats, but that any demand therefor would be released and discharged.

Defendant avers that said Charles Pullman did so understand the matter and did so agree, whereby any claim, if any, for
38 extra work as to such matter was released and abandoned.

Defendant avers that cross-seats were put in said cars, but same were not covered with plush.

Defendant denies each and every allegation in said second count contained; wherefore defendant demands judgment on the second count.

III.

Defendant for further amended answer to all the counts of the petition avers:

Plaintiff is a corporation engaged, among other things, in the

manufacture and construction of different kinds of cars, including cars for use and operation upon street cable-car lines, together with different appliances in connection with the same.

Plaintiff was at the time of the grievances hereinafter complained of so engaged, and the place of the construction and manufacture aforesaid was in Cook county, Illinois, many hundreds of miles away from Kansas City, Missouri.

That the defendant at the time of the grievances hereinafter complained of was a corporation engaged in the construction and operation of different lines of street railway in Kansas City, Missouri. Prior to June 14, 1887, defendant was the owner of a line of street railway in said city known as the "Twelfth-street line," then in process of construction, which it desired to operate by means of an endless cable and upon which it was necessary to operate what are known as cable cars; that upon said line there were many curves and heavy grades.

Prior to making any contract with defendant and prior to doing any work under any contract with defendant plaintiff knew of the condition of said line and all about its curves and grades and knew what was necessary to be done in manufacturing and
39 constructing cable cars in all respects sufficient for the purposes of use as cable street cars upon that particular line.

Prior to June 14, 1887, the plaintiff, by its authorized agent, Charles L. Pullman, represented and verbally agreed with defendant that plaintiff would manufacture and deliver to defendant twenty-five (25) combination closed and open cable cars for use as cable cars on defendant's Twelfth-street line in Kansas City, Missouri, with cross-seats, which cars should contain every desirable and necessary feature that could be combined in their construction, at a cost of two thousand ($2,000) dollars per car.

Afterwards, on June 21, 1887, defendant made a proposition in writing in which they enclosed a contract and certain specifications for the building of twenty-five combination closed and open street cars for defendant for said line. The contract so enclosed was the same as copied into the petition with the exception that the words "Accepted June 27, 1887, Metropolitan Street Railway Company, by Knight & Bonteeou, chief engineers," were not written thereon. The specifications were general and incomplete and indefinite and were the same as set forth in the petition with the exception of the words "Plans to be sent for approval Met. Co.'s eng'r."

Afterwards, upon June 27, 1887, the defendant made a written acceptance of said contract by the chief engineer's endorsing thereon, "Accepted June 27, 1887, Metropolitan Street Railway Company, by Knight & Bonteeou, ch'f eng'rs," and adding to said specifications the words "Plans to be sent for approval Met. Co.'s eng'r," meaning thereby that plans were to be sent to the engineer of the defendant, and by enclosing the papers with a letter in words and figures as follows, to wit:

40 "KANSAS CITY, MO., *June 27th*, 1887.

The Pullman Palace Car Company, G. F. Brown, gen'l mangr., Chicago, Ill.

DEAR SIR: Your letter of the 21st, enclosing contracts and specifications in duplicate for the 25 combination cars for our 12th-street line, addressed to our President Morse, has been referred to us for attention in his absence, and we enclose you with this one copy duly executed by us on behalf of the company.

Will you kindly advise about when we may expect to get the general plans which Mr. Pullman, when here, promised to let us have.

Yours truly,

(Signed) KNIGHT & BONTECOU,
Chief Eng'rs."

Said letter was part and parcel of the contract as made by defendant. Said modifications, acceptance, and writing were accepted by defendant, but the contract was left incomplete as to the plans for the cars upon said line, which plans were to be furnished in the future. Afterwards, and before any work was done or any plans were sent or the contract complete, the following additional specifications were agreed upon by and between plaintiff and defendant:

"KANSAS CITY, MO., *July* 16, 1887.

Combination cars for Metropolitan Street Railway Co.
Length to be 33 feet over all.
Width, 8 ft. 3 inches over all.
Width of floor frame, 7 ft. 3 inches.
Height from top of track to top of floor, 2 ft. 3½ inches.
Distance between centers of trucks, 20 ft. 0 inches.
41 Wheel base of truck, 4 ft. 8 inches.
Distance from front of car to center of forward truck, 4 ft. 9 inches.
Length of closed part of car, 20 ft. inside.
Length of open portion, 8 ft. 9 inches.
Rear platform, 3 ft. 7 inches.
Size of wheels, 22 inch. diameter.
16 cross-seats, to be fixed as decided.
Approved July 16th, 1887.

(Signed) KNIGHT & BONTECOU,
Engineers."

Afterwards, and when said contract was still incomplete, the defendant agreed to bind itself to do and carry out whatever C. L. Pullman agreed to and agreed to so make the cars that they would possess every desirable and necessary feature that could be combined in their construction for use as cable cars on said line, and that they would have cross-seats; whereupon the plans aforesaid were furnished, a completed contract for building said cars for said line was made, and the work commenced by plaintiff; and by the

contracts aforesaid plaintiff undertook and agreed to build for defendant twenty-five closed and open cable cars, with all necessary conveniences, appliances, and appendages, for use as street cars upon the line of defendant in Kansas City, Missouri, known as the "Twelfth-street line," and for no other purpose, which cars were to be fit for such use and purpose and free from any latent defect, and the brakes of which could be properly operated for both trucks by the gripman in his place, and plaintiff agreed to deliver said cars on or before October 10, 1887, for such use and purpose.

42 By the terms of the proposition as originally made and accepted in part under the circumstances stated herein the cars were to be delivered free on board of cars at Pullman or Kensington, Illinois, and defendant was to pay for each of said cars the sum of two thousand dollars cash on delivery. Said proposition, so accepted in part as stated herein, provided that the said cars were to be inspected and accepted at the works of plaintiff in Pullman, Illinois. Under the arrangement and agreement between the parties the specifications did not cover all the work to be done nor the details as to how the work was to be done, which was to be left to the superior judgment of plaintiff.

Afterwards said contracts and arrangements were by mutual consent modified and changed in the following respects:

The cars were not to be paid for on delivery. Said cars were to be delivered at Kansas City, Missouri, and tested by defendant before acceptance. The provisions as to acceptance and inspection at the works of plaintiff were abandoned and set aside. Plaintiff agreed to remedy all defects, if any, in the cars or their appliances. Afterwards, and long after the time agreed upon for delivery, plaintiff did send twenty-five cars to defendant at Kansas City, Missouri, for test and inspection. Said cars were there tested by defendant and found to be and they were in fact insufficient for street-car purposes and insufficient for the purposes for which they were sold. They were unfit and improper for use as cable cars and were unfit and improper for use as cable cars upon said Twelfth-street line. There were latent defects in said cars and brake appliances, improper and insufficient brakes and wheels, trucks and cars. The cars were of too great weight to be operated over the curves and grades upon said line. The brakes could not be oper-

43 ated sufficiently for both trucks by the gripman in his place.

Within a reasonable and proper time and before using said cars for street service defendant notified plaintiff that said cars were so defective, useless, and insufficient, whereupon plaintiff agreed and attempted to make said cars fit and proper for the use for which they were sold and free from the defects which existed and to make them satisfactory to plaintiff, all of which plaintiff wholly failed to do. Said cars were worthless to this defendant, and after inspection it refused to receive or accept same, and within a reasonable time and long prior to the institution of this suit rescinded the contract and tendered said cars back to plaintiff, who refused to receive them, whereupon defendant stored them in a safe

place, subject to plaintiff's order, and so notified plaintiff, and said cars are still so stored in their original condition and are now and have been ever since so stored and subject to plaintiff's order.

There was a consideration for each of the contracts set forth herein.

Defendant denies each and every allegation not herein admitted. The defendant avers that, while it executed the paper sued on as a contract, said paper was only part of the contract between the parties.

Wherefore defendant asks to be dismissed with costs.

IV.

Defendant for further amended answer and for amended counterclaim avers:

It reavers each allegation of paragraph III of this answer the same as if specifically set forth herein. Before discovering the defects in and insufficiency of said cars and appliances, defendant paid a large amount of freight, supposing that the cars and appliances were in their proper condition.

And defendant further avers that before putting said cars into the street-car service or before the delivery of all of them the defendant notified plaintiff of the insufficiency and uselessness of said cars, when the plaintiff for a valuable consideration represented to and agreed with the defendant that it would remedy the defects and make the cars satisfactory to defendant and induced the defendant to put the cars in service on said Twelfth-street line and continue them in such service by representing that they would remedy the defects and make the cars satisfactory to defendant and attempting so to do. Relying upon the said promises and representations, defendant put the cars into such service as a test and attempted to continue the service. The plaintiff did not remedy the defects nor make the cars satisfactory to defendant, and the cars, with their appliances, were not reasonably fit for use as street cars on such line, and by reason of so using them upon such promises and representations the defendant was damaged in a large sum.

Among other things there was a large loss of profits in street-car traffic; there was a loss of the use of the line of road; there was a loss of business; large expense was incurred in the employment of servants, agents, and employés to work on and about the line in making the test; time was lost; time of employés was lost; the road-bed, tracks, rails, cables, ropes, and appliances were injured, and great expense was incurred in making the test, and the defendant was put to a large expense in storing, protecting, and caring for said cars for plaintiff's benefit and to its use after the rescission of the contracts and the refusal to accept said cars and the rejection of same.

Defendant also paid a large amount of freight and drayage on said cars, supposing they complied with the contracts made and were reasonably fit for the purposes for which they were sold.

And from and by reason of using said cars upon the promises

and representations aforesaid and the expense incurred for storing, protecting, and caring for said cars, and the payment of freight and drayage as aforesaid, defendant has been damaged in the sum of $75,000, for which sum, with costs, defendant asks judgment.

PRATT, McCRARY, FERRY & HAGERMAN,
Attorneys for Defendant.

Received a copy of the foregoing amended answer and counter-claim this — day of April, 1889.

—— ——,
Attorneys for Plaintiff.

Said reply so filed as aforesaid is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

PULLMAN'S PALACE CAR COMPANY, Plaintiff,
vs.
METROPOLITAN STREET RAILWAY COMPANY, Defendant.

Now comes plaintiff, and for reply to the amended answer and counter-claim of the defendant filed herein denies each and every allegation in said answer and counter-claim contained, and prays judgment as in the petition.

J. S. RUNNELLS,
LATHROP, SMITH & MORROW,
Attorneys for Plaintiff.

46 The said waiver of jury, so filed as aforesaid, is in the words and figures following, to wit:

Circuit Court of United States, Western Division, Western District of Missouri.

PULLMAN PALACE CAR CO.
v.
METROPOLITAN STREET RAILWAY COMPANY.

Stipulation.

Jury is hereby waived in above case. Case is to be tried when the circuit judge is present & sitting at the trial.

J. S. RUNNELLS,
GARDINER LATHROP, *Att'ys for Pl'ff.*
PRATT, McCRARY, FERRY & HAGERMAN,
Att'ys for Def't.

And afterwards, at said term of said court and on the 25th day of April, A. D. 1889, the following further entry appears of record in said case, to wit:

PULLMAN'S PALACE CAR CO.
vs.
METROPOLITAN STREET R'Y CO. } 1437.

This day again come the parties, by their attorneys, as on yesterday; thereupon further proceedings are had, and, the hearing not being concluded at the hour of adjournment, it is ordered that further proceedings be postponed till tomorrow.

And afterwards, at said term of said court and on the 26th day of April, A. D. 1889, the following further entry appears of record in said case, to wit:

47 PULLMAN'S PALACE CAR CO.
ag'st
METROPOLITAN ST. R'Y CO. } 1436.

This day again come the parties, by their attorneys, and thereupon this cause is further heard and is argued by counsel and submitted to the court.

And afterwards, at the regular September term, 1890, of said court and on the 16th day of September, A. D. 1890, the following entry appears of record in said case, to wit:

PULLMAN'S PALACE CAR CO.
ag'st
METROPOLITAN STREET RAILWAY CO. } 1437.

This day come the parties, by their attorneys, the plaintiff by Gardiner Lathrop and J. S. Runnells, and the defendant by Wallace Pratt and Frank Hagerman, and this cause being regularly called for hearing before the court without the intervention of a jury, a jury having been waived by a stipulation in writing heretofore filed, thereupon the hearing is proceeded with, and, not being concluded at the hour of adjournment, it is ordered that further proceedings be postponed till tomorrow morning.

And afterwards, at said term of said court and on the 17th day of September, 1890, the following further entry appears of record in said case, to wit:

PULLMAN'S PALACE CAR CO.
ag'st
METROPOLITAN STREET RAILWAY CO. } 1437.

18 This day again come the parties, by their attorneys, as on yesterday, and thereupon further proceedings are had, and, the hearing not having been concluded at the hour of adjournment, it is ordered that further proceedings be postponed till tomorrow morning.

And afterwards, at said term of said court and on the 18th day of September, 1890, the following further entry appears of record in said case, to wit:

PULLMAN'S PALACE CAR CO.
ag'st
METROPOLITAN STREET R'Y CO. *et al.* } 1437.

This day come the parties again, by their attorneys, and thereupon the cause is submitted to the court on the pleadings and the proofs and taken under advisement.

And afterwards, at said term of said court and on the 13th day of October, A. D. 1890, the following further entry appears of record in said case, to wit:

PULLMAN'S PALACE CAR CO.
ag'st
THE METROPOLITAN STREET RAILWAY CO. } 1437.

This day a special finding of facts in the above cause is filed herein.

The same, being afterwards withdrawn by the court for further consideration, is not here recorded.

And afterwards, at said term of said court and on the 1st day of December, 1890, the following further entry appears of record in said case, to wit:

49 PULLMAN'S PALACE CAR CO.
ag'st
THE METROPOLITAN STREET RAILWAY CO. } 1437.

This day plaintiff files motion for a new trial herein.

And afterwards, at said term of said court and on the 5th day of January, A. D. 1891, the following further entry appears of record in said case, to wit:

PULLMAN'S PALACE CAR CO.
against
THE METROPOLITAN STREET RAILWAY CO. } 1437.

Judgment.

This cause having been heretofore submitted to the court, the Hon. David J. Brewer, as circuit judge, and the Hon. John F. Philips, as district judge, and the cause not having been decided before the said circuit judge had resigned his office, the cause came on for hearing at the present term before the court, the Hon. Henry C. Caldwell, as circuit judge, and the Hon. John F. Philips, as district judge, sitting as the court, the plaintiff appearing by its attorneys, John S. Runnells and Gardiner Lathrop, and the defendant by Wallace Pratt and Frank Hagerman, its attorneys; thereupon the former submission was set aside by consent, and thereupon the parties each offered their evidence and resubmitted the cause—the court, both of said last-named judges, sitting—a jury having been waived by written agreement of the parties, and the court, after

hearing the evidence and arguments of counsel, took the cause under advisement, and afterwards, on this day, filed herein a finding of fact and conclusion of law in words and figures as follows:

50 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

PULLMAN'S PALACE CAR COMPANY
against
THE METROPOLITAN STREET RAILWAY COMPANY.

Be it remembered that when this case came on for trial the parties waived a jury and, by agreement in writing filed with the clerk, agreed to try the issues of the case before the court; whereupon the court proceeded to hear the evidence and after due consideration thereof makes and declares the following special findings of facts thereon:

1st. The plaintiff for a long time prior to the transactions now in controversy was and has ever since been a corporation extensively engaged, among other things, in the manufacture and construction of cars, including cars for street cable railways, at Pullman, Illinois.

2nd. The defendant for a long time prior to the matters in controversy was and ever since has been a corporation organized under the laws of the State of Missouri engaged in the operation of street railway lines, including what is known as cable lines, in Kansas City, Missouri, and Kansas City, Kansas.

3rd. Prior to May 13th, 1887, defendant, preparatory to the operation thereof, was engaged in the construction of a double-track railway in Kansas City, Missouri, extending from the eastern city limits a long distance along Twelfth street to Bell street, at the western limits of the city, and upon said Bell street to the stock yards, thence back on Genesee street to Twelfth and on to the eastern city limits.

4th. The maximum grade of this line is thirteen and four-
51 teen per cent.—that is, thirteen and fourteen feet ascent in a distance of 100 feet. This grade was five hundred to six hundred feet long. On this line there were a number of grades running up to ten per cent. There were also on the line a number of sharp curves. This line was known as defendant's Twelfth-street line.

5th. On May 15th, 1887, the road-bed being constructed and track laid, defendant's chief engineer wrote the following letter to the agent of complainant, to wit:

"KANSAS CITY, MO., *May 13th*, 1887.

Mr. Chas. Pullman, Pullman Palace Car Co., Pullman, Ill.

DEAR SIR: We write to say that we are now ready to talk cars for our Wyandotte and 12th-street lines and should be glad to have you call on us at your convenience.

Yours truly, KNIGHT & BONTECOU,
Chief Engineers."

6th. Pursuant to this letter Mr. Chas. Pullman, the general agent of plaintiff, came to Kansas City in person for the purpose of discussing the subject-matter of the proposed contract and preliminaries connected therewith.

7th. While in Kansas City said Pullman was on the ground and, whilst not going over the line of the track, had a general knowledge of the grades and curves thereof. Thereafter he returned to the city of Chicago, from which place plaintiff sent a letter to the defendant in the following words:

52 "CHICAGO, *June 21st*, 1887.

Chas. F. Morse, Esq., president Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: I beg to enclose herewith contract with specifications attached, executed by me in duplicate, for the building of twenty-five (25) combination closed and open street cars for your Co. Kindly sign and return to me one copy of contract for our files.

You will notice in the specifications that the space for the lettering has been left blank, and I would be glad if you would indicate on the specifications returned the lettering you desire applied to the cars.

Very respectfully, GEO. W. BROWN,
General Manager.

"2 enclosures."

The contract and specifications contained in the foregoing letter are in the words and figures following:

"*Agreement.*

CHICAGO, ILLS., *June 14th*, 1887.

Metropolitan Street Railway Co., Kansas City, Mo.

GENTLEMEN: Pullman's Palace Car Company will build for the Metropolitan Street Railway Company twenty-five (25) combination closed and open cable cars, as per general specifications hereto attached and made a part of this agreement, and deliver the same f. o. b. Pullman Junction of Kensington, Ills., on or before October 10th, 1887, delays by fires, strikes, and unavoidable hindrances
53 excepted, for the sum of two thousand ($2,000.00) dollars each.

Terms, cash on deliveries.

Cars to be inspected and accepted at our works.

Your written acceptance hereof will constitute a contract mutually binding upon both companies.

(Executed in duplicate.)

PULLMAN'S PALACE CAR COMPANY,
By GEO. F. BROWN, *General Manager.*

Accepted June 27, '87.

METROPOLITAN STREET RAILWAY COMPANY,
By KNIGHT & BONTECOU, *Chief Engineers.*

Pullman's Palace Car Company, Pullman car works.

PULLMAN, ILL., *June* 14, 1887.

General Specifications

For twenty-five (25) combination cars, lot —, plan 510, for account of Metropolitan Street R'y Co.

Ground plan .... | Length, 34′ 9″ over all; width, 6′ 6″ or more over sills.
Framing..... | Height from top of sill to under plate, —.
Flooring..... | Pullman st'd.
Style of outside.. | Number of windows each side, 8.
Roof..... | " " " end, 2.
Hood.....

Window sash, cherry.
Glass, D. T. French. Size—lower, —; upper, —.
54 Glass, in clear story, embossed. Size, —.
" in doors, D. T. French. Size—lower, —; upper, —.
Blinds, cherry frames, basswood slats.
Ceiling, mahogany; decoration, —.
Inside finish, same as 16′ cars recently built.
Seat ends, —; seating capacity, —.
Seats and backs, same as 16′ cars recently built.
Seat and back springs, —.
" " covering, Wilton plush carpet.
Trimmings, bronze.
Lamps, center; 2 in closed & 1 in open part.
" bracket, none.
Water cooler, "
Heater, "
Saloons, "
Locks, "
Body colors, same as 16′ cars recently built.
Decoration, suitable design.
Lettering, —.
Numbers, from 200 to 224, inclusive.
Names, none.
Platforms, 3′ 9″, per sketch, with one gate on left-hand side.
Height from top of rail to center of drawbar, —.
Colors, same as 16′ cars recently built.
Draw-springs, —; buffer springs, —.
Brakes to be operated by gripman, with lever, both trucks.
Brake-power, —.
Sand-boxes to be applied on front truck at centre.
55 Trucks, Pullman st'd for cable cars.
Gauge, 4′ 8½″.
Wheel base of truck, rear truck, 4′ 0″; front truck, short as possible to admit grip.
Colors, —.
Wheels, Fulton foundry.

Axles, 3½", iron.
Springs, bolster, —; pilot on front truck.
" equalizer, Vose.
Pedestals, Bemis; wire guards on side.
Oil-boxes, "
Oil-box lids, "
Brake-shoes, Congdon flange.
Journal bearings, Bemis.

REMARKS.—Extra brakes on rear trucks operated by brake-mast, with wheel at rear-end platform."

8th. The defendant executed said contract, as shown in the copy, and returned one copy of the same with a letter, as follows:

"KANSAS CITY, MO., *June 27th*, 1887.

The Pullman Palace Car Co., G. F. Brown, gen'l man'g'r, Chicago, Ills.

DEAR SIR: Your letter of the 21st, enclosing contracts and specifications in duplicate for the 25 combination cars for our 12th-street line, addressed to our president, Morse, has been referred to us for attention in his absence, and we enclose you with this one copy, duly executed by us on behalf of the company.

Will you kindly advise about when we may expect to get
56 the general plans which Mr. Pullman, when here, promised to let us have.

Yours truly,
(S'g'd) KNIGHT & BONTECOU,
Chief Eng'rs."

9th. Between the first and sixteenth of July, 1887, the plaintiff's engineer, Mr. Twyman, visited Kansas City, stating that the general purpose of his visit was to determine upon the general features of the cars; to determine what was the shortest curve and other physical conditions of the road; to determine the radius of the shortest curve it would have to go round, and to arrange with reference to the outside width and the extra length over all; the relative position of the trucks, the height of the wheels, the steps and the seats, and the distance between the seats, &c. He was at the office of defendant's engineer for some time and had access to the plans and profiles of the road, and while in Kansas City the following specifications were submitted by defendant's engineer:

"*Specification.*

KANSAS CITY, MO., *July 16th*, 1887.

Combination cars for Metropolitan Street Railway Co.
Length to be 38 feet over all.
Width, 8 ft. 3 in. over all.
Width of floor frame, 7 ft. 3 in.
Height from top of track to top of floor, 2 ft. 3½ in.
Distance between centres of trucks, 20 feet 0 inches.

Wheel base of truck, 4 feet 8 inches.
Distance from front of car to centre of forward truck, 4 ft. 9 in.
Length of closed part of car, 20 ft. inside.
Length of open portion, 8 ft. 9 in.
Rear platform, 3 ft. 7 in.
57 Size of wheels, 22 in. diameter.
16 crossseats, to be fixed as decided.
Approved July 16th, 1887.
(S'g'd) KNIGHT & BONTECOU, *Engineers.*"

10th. Thereafter the plaintiff proceeded with the construction of the cars. The defendant gave no direction in relation to the brakes on the cars otherwise than that they should be extra heavy and extra powerful; nor were any plans or specifications of brakes furnished to the defendant during their construction. The brake put upon these cars was designed and constructed by Mr. Twyman, plaintiff's engineer.

11th. In December, 1887, in response to plaintiff's request that defendant send one its employees to Pullman to inspect the cars., E. J. Lawless, defendant's superintendent, went there for that purpose. Ten or twelve cars were then shown as completed and standing in the shops of plaintiff, on the floor where they were run out. Said Lawless made a thorough examination of said cars, inside and out, and examined the brakes by having them worked from within and observing their operation and application while under and at the side of the car, and announced himself as satisfied therewith, and requested the representative present of the plaintiff to finish the others up in the same way and forward them without more —. No further request was made by said Lawless for testing said cars, and no other facilities were offered by the plaintiff for making such test and examination.

12th. The first five cars were shipped by plaintiff February 24, 1888. The next shipment, of eight cars, was on March 1st, 1888. The next shipment was of two cars, March 17, 1888. Five
58 cars were shipped March 27th, 1888, and the remainder on the 30th day of March, 1888.

13th. The cars, when they reached Kansas City, were stored in defendant's power-house, as the eastern extension of defendant's railroad was not then in readiness for operation. These cars were taken into the house by passing over a curved track from the street. This curve was 30-ft. radius. When the first lot of cars were being passed around this curve it was found that the wheels bound against the sills. Thereupon defendant's engineer telegraphed plaintiff as follows: "Forward truck of cars will not pass around 30-foot-radius curve. Lengthen stay-chains and cut away lower corner of middle sills." To which plaintiff answered: "Telegram received. Will make alterations requested."

14th. On the 22nd of March, 1888, before all the cars had been shipped, the east end of the 12th-st. line was completed so a car could run over that part of the line. Defendant's superintendent took out one of the cars for trial, when difficulty about the brakes

of the cars manifested itself, which difficulty was this: When the brakes were so adjusted that they could be used to stop the car on a straight, level track, in passing around a curve or up a grade they would bind against the wheels, causing them to slip, and at times throwing the car from the track. If the brakes were so adjusted that they would not bind on the curves or grades, then they would not work on a straight, level track so as to stop the cars. On the 23rd day of March, 1888, defendant sent plaintiff the following letter:

"KANSAS CITY, MO., 23 *M'ch*, 1888.

Geo. F. Brown, Esq., gen. m'g'r.

DEAR SIR: We tried one of your cars over the line yester-
59 day and found that the brakes would not work satisfactorily; in fact, were perfectly useless. I think the reasons for this are: There being so many connections, and consequently so much lost motion, that before the shoes hug the wheels the brake-lever comes to the limit of the quadrant.

Before starting out with the car we adjusted the brakes so that the shoes touched the wheels, but notwithstanding this we could not lock the wheels or even hold the cars on the lightest grades.

As a perfect working brake is an imperative matter with us, I would like to hear from you on the subject and what remedy you propose.

"Yours truly, EDW. J. LAWLESS."

In response to this letter Mr. Twyman, plaintiff's engineer, came at once to Kansas City and attempted to remedy the trouble with the brake and on leaving claimed that he had done so.

15th. On April 5, 1888, the plaintiff sent the following letter to defendant:

"Pullman's Palace Car Company; Geo. F. Brown, general manager.

GENERAL MANAGER'S OFFICE, CHICAGO, *April 5th*, 1888.

C. F. Morse, Esq., president Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: The entire lot of 25 cars have been delivered, 13 of them having been shipped in February. Bills have been rendered your company for the amount of $50,000.00, being the original contract price without extras, bills for which will be sent your auditor in a few days.

60 Will you kindly direct a prompt remittance for the bills already rendered and oblige,

Very respectfully, GEO. F. BROWN,
General Manager."

8.

Dictated.

And on or about the 7th or 10th day of April, 1888, defendant's whole line was ready to be opened, when the cars for the first time were placed on the line. This was shortly after Mr. Twyman had

left Kansas City. Upon the recurrence of the trouble in operating the cars defendant's president wrote plaintiff the following letter:

"KANSAS CITY, MO., *April 11th*, 1888.

George F. Brown, Esq., gen'l m'g'r Pullman Palace Car Co., Chicago, Ill.

DEAR SIR: I have delayed answering your letter of April 5th for some days, as I wished to see your cars in practical operation before making a reply.

The Twelfth-street cable line has been running since Saturday and we should now be operating with a full equipment if we had not been obliged to make constant repairs and changes to the car brakes.

These are very unsatisfactory and we have hardly been able to make a round trip with a car without stopping to make repairs, and on several occasions have been obliged to run over a considerable portion of the line with no power to set the brakes.

I will make no attempt to go into this matter in detail, but wish to say that I shall insist on these cars being made right in this respect before I should be willing to approve your bills.

If you will send a practical man here to take charge of these necessary changes it will be the best plan; otherwise we
61 shall be obliged to make them and charge you with the expense.

There are some other things about the cars which are not as they should be, but which do not interfere with the operation of them. Many of the panels are badly cracked, and the painting on part of the cars at least is very poorly done. The attention of your engineer was called to these points, and he admitted that the work was not as it should be.

I have no desire to delay the settlement of your bills, and would gladly approve vouchers for them to-day if we could use the cars, as it is costing the company a very large amount of money every day that we cannot operate with a full equipment. Let me hear from you in regard to what action you will take as to the brake repairs at your earliest convenience, and oblige.

Yours truly, C. F. MORSE, *President*."

To which plaintiff sent the following letter:

"CHICAGO, *April 13th*, 1888.

C. F. Morse, Esq., president Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: Your favor of the 11th inst. received and noted. I regret to hear that you are having any further trouble with the brakes on the combination cars, as our engineer reported on his return that the trial made on the brakes on one of the cars while he was there, after some slight changes had been made, proved entirely satisfactory, and there was every reason to suppose that with these little changes the brakes would work well on the remaining cars.

I regret that your engineer or superintendent did not wire us of the situation as indicated in your letter, as we would have
62 sent our engineer over immediately. As it is, he will leave for Kansas City to-night, and I trust that, in conjunction with your people, the defects reported can be easily remedied.

Our engineer did report on his return that the paint was acting *p*adly on a portion of the new cars, and we are sending out two experienced men to attend to the paint-work on such of the cars as require it.

It is proper to explain just here that the defect seems to be with the middle panel, which is painted with what is called 'crimson lake,' and which is one of the most difficult colors to hold.

We regret exceedingly that there has been any trouble in this regard, and you may rest assured that the defects will be remedied without expense to your company. Speaking of the paint reminds me that our people report that the alkali water is very severe on the finish of your cars, as we know from our own experience with sleeping cars where alkali water is used.

Another suggestion in this connection I beg to make is that if your people would take the new cars in shop within about four or five months after they are received and give the paint a thorough cleaning and then two coats of varnish they would run for at least a year without having to be varnished again, and it would also preserve the life of the paint.

Very respectfully, GEO. F. BROWN,
General Manager."

Immediately thereafter the engineer, Twyman, came to Kansas City to look after the trouble in question, and did some work on the brakes while here, but, being called away by letter or telegram, he left for Chicago, stating that he would soon return and complete the work. Instead of so doing he wrote a letter, saying: "I am
63 sorry not to be able to return to Kansas City as quickly as I anticipated. We have, however, arranged to send you a man immediately, who will take charge of the necessary alterations on your cars. There will be no necessity for his leaving Kansas City until everything is arranged to your satisfaction, and I will probably come out there again towards the end of the week." Immediately following this letter plaintiff's mechanic, named Overton, came with typewritten instructions from Mr. Twyman and went to work to remedy the defect in the brakes. He went over the cars one by one, and as he thus went over them pronounced them ready for service. This mechanic stated that he had done all he could do to remedy the difficulty in question, and if it did not accomplish that end he did not know how to remedy it. Notwithstanding the work and effort of this mechanic, the same difficulty thereafter continued to manifest itself in the operation of the cars as to the working of the brakes. Thereupon defendant's president wrote plaintiff the following letter:

"KANSAS CITY, MO., *May 12th*, 1888.

George F. Brown, Esq., general manager Pullman's Palace Car Co., Chicago, Ill.

DEAR SIR: I have delayed corresponding with you farther in regard to the 12th-street cars until your mechanic had finished his work. The result of this work has been very little material improvement in the action of the brakes, and the cars at no time during the progress of the repairs have been in a satisfactory condition to operate and are not in such condition now.

This fact has been reported to the board of directors, which has today passed a resolution rejecting the 25 cars furnished by your company for 12th street on account of the imperfect brakes
64 and other seriously objectionable features, and has instructed me to notify you to this effect, and that the cars are subject to your order.

I am, yours respectfully, C. F. MORSE, *President*."

To which plaintiff made the following answer:

"Pullman's Palace Car Company; G. F. Brown, general manager.

GENERAL MANAGER'S OFFICE, CHICAGO, *May 17th*, 1888.

C. F. Morse, Esq., pres't Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: Your letter of the 12th inst., relating to the twenty-five combination cars built by this company for your company, has been received and noted.

You are cognizant of the fact that the cars were built according to plans approved by your chief engineer, the material used, as well as the workmanship, being first class in all respects.

The cars before shipment were inspected and accepted by your gen'l superintendent. The cars were then shipped to, received, and put in use by you. Subsequently you made complaint that the brakes did not in all respects work satisfactorily, and a competent mechanic was promptly sent to examine the brakes and make any adjustment found necessary. When the brakes were examined and adjusted on one car your officers pronounced them satisfactory; thereupon the brakes were in like manner examined and adjusted on the remaining cars, all the cars then being in use by your company.

In view of the facts your present statement to the effect
65 that you reject the cars on account of "imperfect brakes and other seriously objectionable features" is quite astonishing, and I must assume that you have been misinformed as to the condition of the cars, as I am unwilling to believe that you would knowingly allow yourself to be a party to such an unreasonable and unfounded claim.

I have to request, therefore, that you will without further delay remit the amount due this company for said cars, as per bills here-

tofore rendered, and thus avoid the necessity of any action on our part to enforce the payment of the amount due us.

Very respectfully, GEO. F. BROWN,
General Manager."

16th. The cars could not be operated successfully on defendant's railroad track for which they were designed with this brake, nor upon similar lines, and this defect or inability in the brake was not apparent nor discoverable upon any reasonable inspection made at the place of their manufacture and could not be discovered without a practical test on the defendant's railroad track or over like track. The defect in the brake was a latent one, which did not and could not develope to the observation on inspection, and was only discoverable when put into use on the defendant's track or similar track.

17th. The defendant paid the freight and drayage on said cars from Chicago to Kansas City, the sum of $1,088.50, and paid for building house in which to store the rejected cars, $1,850.

18th. After the sending of the letter by defendant's president to the plaintiff informing it that *that* the cars were rejected and were at plaintiff's disposal, the defendant built a car-house at or near Kansas City and stored therein these cars, where they have ever since remained.

66 19th. The defendant operated upon its said road combination cars of a similar character, weighing about six hundred pounds less than the cars in controversy, which were manufactured by the Laclede Car Company of St. Louis, Missouri, and were operated by a brake of a different pattern, costing from seventy-five to one hundred dollars apiece.

20th. The defendant did not use and operate the cars in question longer than was reasonably necessary to ascertain whether they could be successfully operated with the brake furnished therewith.

21st. During the time defendant run the cars on its road, during the tests made, as hereinbefore found, passengers were received thereon and fares collected from them by defendant. The successful running of the trains was frequently interrupted by breaking of the cable and the locking of the car wheels, in consequence of the defective construction of the brakes, and defendant so continued in the attempt to run said cars during the time of plaintiff's promises to repair the alleged defect, and on such trips received on board of said cars passengers and collected from them the customary fare. On the trial defendant offered to prove that owing to the insufficiency of the brakes the cars were run at loss, and that no profit resulted from collection of fares. On plaintiff's objection this testimony was by the court excluded.

22nd. Defendant had in its employ during the time in question two engineers of skill and experience, one of whom, Mr. Lawless, the same person who went to Chicago to inspect the cars at plaintiff's yards, had experience in the construction and practical opera-

tion of cable cars in San Francisco, California, prior to the time of taking service from defendant.

67 To the findings of the foregoing facts and each of them and the declaration of law arising thereon the plaintiff at the time duly excepted and still excepts.

Upon the foregoing facts the court on its own motion declared the law of the case to be that the defendant had the legal right to rescind the contract for the purchase of said cars in the time and manner set out in the foregoing special findings of fact, and that the defendant rescinded said contract in accordance with its legal right so to do and made a lawful tender of said cars to the plaintiff and is not liable to the plaintiff for the contract price of said cars or any other sum, and that the defendant is entitled to recover from the said plaintiff the freight and drayage on said cars from Chicago to Kansas City, amounting to the sum of one thousand eighty-eight and $\frac{50}{100}$ dollars, for which judgment will be entered.

To which declarations of law upon the facts found as aforesaid and to each and every one of them separately the plaintiff, by its attorneys, at the time excepted, and the plaintiff asked the court to declare the law upon the finding of facts aforesaid to be with the plaintiff, and that the plaintiff was in law, upon the facts found, entitled to recover from the defendant the contract price for said cars, with interest; which declaration of law the court refused to make; to which ruling of the court the plaintiff, by its attorneys, at the time excepted, and the court now here signs and seals the finding of facts and the said plaintiff's several exceptions to the rulings of the court and orders that the same be spread upon the record and made part of the record of this cause.

HENRY C. CALDWELL,
Circuit Judge.
JNO. F. PHILLIPS,
District Judge.

68 It is therefore ordered, adjudged, and considered by the court that the defendant do have and recover of plaintiff judgment on the first count of the petition and that same be dismissed.

It is therefore ordered, adjudged, and considered that defendant do have and recover of plaintiff judgment on the second count of the petition and that same be dismissed.

It is therefore ordered, adjudged, and considered that the defendant do have and recover of plaintiff judgment on the third count of the petition and that same be dismissed.

It is therefore ordered, adjudged, and considered that defendant do have and recover of plaintiff judgment on the fourth count of the petition and that same be dismissed.

And the court doth order and adjudge that defendant do have and recover of plaintiff upon the counter-claim filed herein the sum of $1,088.50.

It is further ordered, adjudged, and considered that defendant do

have and recover of plaintiff the costs of this action and that execution issue therefor.

And plaintiff takes leave to present bill of exceptions by the first Monday in February.

And afterwards, at said term of said court and on the 2nd day of February, A. D. 1891, the following further entry appears of record in said case, to wit:

PULLMAN'S PALACE CAR COMPANY
against
METROPOLITAN ST. R'Y CO. } 1437.

This day comes the plaintiff, by its attorneys, and upon its motion leave is extended to February 20th, 1891, to prepare and present bill of exceptions.

69 And afterwards and in vacation of said court, to wit, on the 19th day of February, A. D. 1891, the following further entry appears of record in said case, to wit:

PULLMAN'S PALACE CAR CO.
against
METROPOLITAN ST. R'Y CO. } 1437.

The following order was presented to the court, attached to the bill of exceptions in the above-entitled cause, and the same was ordered to be filed and spread upon the records of the court:

PULLMAN'S PALACE CAR COMPANY, Plaintiff,
vs.
METROPOLITAN STREET RAILWAY COMPANY, Defendant. } No. 1437.

The annexed and foregoing bill of exceptions is presented to me for allowance by the plaintiff on this nineteenth day of February, A. D. 1891. It appearing that the same has been exhibited to the defendant and written objections filed to the allowance thereof, the time for settling said bill and signing and filing the same is hereby extended to the next term of this court, so that the same may be allowed, signed, and filed at any time during said term, said signing and filing to be entered as of this date.

February 19th, A. D. 1891.

(Signed) JNO. F. PHILLIPS,
U. S. Dist. Judge.

And afterwards, at an adjourned — of said September term, 1890, and on the 24th day of February, A. D. 1891, the following further entry appears of record in said case, to wit:

70 PULLMAN'S PALACE CAR COMPANY
ag'st
METROPOLITAN STREET RAILWAY COMPANY. } 1437.

It is ordered by the court that the order made herein on the second day of February, A. D. 1891, relative to the time for filing bill

of exceptions be set aside, and in lieu thereof the following order is hereby made, to be entered as of the date of the second day of February, A. D. 1891, *nunc pro tunc*.

It is hereby ordered that the time for filing bill of exceptions herein be, and the same is hereby, extended until the next term of this court, the same to be filed on or before the first day of April, 1891, with the same force and effect as though the same had been filed at the present term.

And afterwards, at the regular March term, 1891, of said court and on the 14th day of March, A. D. 1891, the following further entry appears of record in said cause, to wit:

PULLMAN'S PALACE CAR COMPANY
against
METROPOLITAN STREET RAILWAY COMPANY. } 1437.

This day come the parties, by their attorneys, and thereupon the plaintiff presents to the court a bill of exceptions, and after consideration thereof the same is signed and sealed by the court and ordered to be made a part of the record herein.

Said bill of exceptions, so filed as aforesaid, is in words and figures as follows, to wit:

71 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

PULLMAN'S PALACE CAR COMPANY
against
METROPOLITAN STREET RAILWAY COMPANY. } Law.

Bill of Exceptions.

Be it remembered that this cause came on for trial before the court, the Honorable Henry C. Caldwell, circuit judge, and the Honorable John F. Philips, district judge, a jury having been waived by stipulation, on the 16th day of September, A. D. 1890.

And the plaintiff, to maintain the issues on its part, introduced the following evidence:

Counsel for plaintiff offers in evidence the contract upon which this suit is brought, dated June 14th, 1887, a copy of which is hereto attached and marked Exhibit "1."

72 HENRY H. SESSIONS, called on the part of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Mr. BURRY:

Q. State your residence and occupation.

A. My residence is Pullman, Illinois; occupation, manager of the Pullman works.

Q. Will you look at this contract that has been offered in evi-

dence as Exhibit "1." Do you remember about the twenty-five combination cars referred to in it being built?

A. I do.

Q. Were they built?

A. They were.

Q. Were they ever inspected by any officers of the Metropolitan road?

A. They were inspected.

Q. By whom?

A. By Mr. Lawless.

Q. Their superintendent, I believe?

A. Yes, sir.

Q. When?

A. About the last of December; either the 29th or 30th day of December.

Q. 1887?

A. 1887.

Q. How many cars were ready for inspection at that time?

A. To the best of my recollection, about 15 cars; possibly 18.

73 I should say 15 were ready for inspection.

Q. Where did Mr. Lawless inspect them?

A. At the street-car shop of the works.

Q. What works?

A. Pullman works, at Pullman, Ills.

Q. What kind of an inspection of them did he make?

A. Well, it was a general and thorough inspection, as they make of all cars usually.

Q. Did he inspect one of the lot or the whole of them?

A. He inspected all of them that were ready at that time.

Q. Give more in detail how the inspection was made by him.

A. The interior of the cars was inspected first, particularly the seats, the interior finish, and he also went over the dimensions of the car-, and the exterior of the cars, and the running gear, brakes, etc. They were thoroughly inspected.

Q. You say he inspected the brakes?

A. He did.

Q. In what way?

A. The first inspection of the brakes was of the leverage underneath the cars.

By Mr. PRATT:

Q. What is that?

A. The brake leverage or connections underneath the car. He got down under both sides of the car, and one of our workmen tried the brake-levers so he could see how the levers worked under the car.

Q. Were the brake-shoes on?

A. They were all connected, ready for service.

Q. What else did he do towards an inspection of the works?

A. He inspected the brake-levers inside of the open por-

74 tion of the car.

Q. Did he try it himself?

A. He did.

Q. Did he make any objection to it?

A. He did.

Q. What was the objection?

A. He said the brake-lever was located too far forward from where the gripman would naturally stand, necessitating his taking possibly a long step in order to reach the handle of the brake-lever.

Q. There are two levers in these cars—one the grip-lever and one the brake-lever?

A. Yes, sir.

Q. And these two levers were going to be too far apart, as I understand it?

A. Yes, sir.

Q. Now, then, did he suggest any remedy?

A. He did.

Q. What was it?

A. As he expressed it, he wanted to make a goose-neck of the lever—that is, bending back to the reverse curve, bringing the handle of the brake-lever more nearly to the grip-lever.

Q. What was then done?

A. The lever was taken out and bent, as he suggested.

Q. While he remained there?

A. Yes, sir.

Q. Was it then put back in the car?

A. Yes, sir.

Q. How did he like it then?

A. Well, he said it was an improvement, but it did not
75 suit him yet.

Q. What further did he want?

A. He had it taken out again and bent in a little different shape, and it was put back and he tried it and he said it suited him.

Q. Did he make any other criticism whats ever upon the cars?

A. He did not.

Q. What did he say about them?

A. After looking over possibly a dozen cars, possibly 15, he said: "You may fix the brake-levers all like that, and then ship the cars." He says: "That is all right; ship the cars."

Q. Did he make any comments on the brakes after they were fixed in that way, as to whether they were good or bad?

A. Nothing more than to say he was satisfied when he inspected the brakes. After the lever was bent he again looked under the car while one of the workmen worked the brake-lever, and he said, that would work all right.

Q. Did Mr. Lawless ever return to Pullman to inspect the balance of the cars?

A. He did not, to my knowledge.

Q. Why not?

A. Well, he told me when he went away to fix the cars all like that, and it would not be necessary for him to come back and inspect the rest.

Q. Were all the brake-levers changed to correspond to the one whose shape he prescribed as you have detailed?

A. I could not state positively. The order was given to have them all changed as he wanted them, and I think they were changed. I wouldn't say positively.

Q. Now, you say he told you to make the remainder of the
76 cars the same as these, and forward them?

A. Yes, sir.

Q. Did you do that?

A. We did; yes, sir.

Q. Were the cars that Mr. Lawless did not inspect built in all respects like the ones that he did inspect?

A. They were.

Q. What was then done with these cars in the way of shipment?

A. Well, they were shipped as soon as they could be gotten ready.

Q. Shipped to whom?

A. Shipped to the Metropolitan Street Railway Company.

Q. Do you remember over what road?

A. There were conflicting orders about the shipping of them, and I could not state positively over what road they went finally.

Q. Did you ship them with the directions of the Metropolitan people?

A. We did not and could not have shipped them without.

Q. Look at the specifications attached to the contract, and read what kind of seats and backs is therein prescribed for these twenty-five cars.

A. Seats and backs are, from these specifications——

Objected to. Let the witness read the specification.

A. (cont.). "Seats and backs same as 16 cars recently built."

Q. Had you then recently built any 16 cars for this defendant company?

A. Yes, sir.

Q. How were the seats arranged in those 16 cars?

A. They were longitudinal seats.

Q. What kind of seats were put in the twenty-five cars
77 now in dispute?

A. Cross-seats.

Q. At whose request?

A. At the request of the Metropolitan Street Railway Company.

By Mr. HAGERMAN:

Q. Are you now stating what you know personally or what you know by correspondence?

A. By the correspondence, which I have seen, from the Metropolitan Company.

Counsel for *plaintiff* (def't) objects to the witness stating his conclusions as to the correspondence. Objection sustained.

By Mr. BURRY:

Q. State what the difference in the value per car is, or then was, between these cars arranged with longitudinal seats, as called for in the specifications, and cross-seats, as the same were built?

A. From 130 to 135 dollars per car more for the cross-seats.

Q. You mean than for longitudinal seats in the same car?

A. That is the way I figure it.

Q. Do you remember of furnishing and applying one gong to each of said twenty-five cars?

A. I do.

Q. What was the reasonable value of the gongs so applied?

A. The gongs cost about $8.00 apiece, applied to the cars.

Q. Do you remember of applying two extra sand-boxes to each of these twenty-five cars, beyond what was called for by the specifications?

A. I do.

78 Q. Where were those boxes got?

A. They were the Boston reliable sand-box.

Q. What was the fair value of the sand-boxes you so obtained and applied to these twenty-five cars, together with the cost of applying the same?

A. As applied to those cars, in my judgment, it would be worth about $30.00 per car.

Q. Do you remember about the renumbering of any of the cars?

A. I remember that it was done.

Q. Was the numbering changed?

A. Yes, sir; it was.

Q. Plaintiff has sued for $39.75 as the cost of such relettering. Do you think that is a reasonable amount to charge for the work done?

A. I should say it was a reasonable amount.

Q. When you placed these cars upon the flat car to be shipped to the Metropolitan street railway, was there any advance switching charges or freight charges paid by the Pullman Company?

A. Yes, sir.

Q. How much per car was so paid?

A. The rates are $2.50 per car for the transfer, as we call it.

Q. Was that amount so paid by the Pullman Company?

A. I assume it was. Of course, the transaction was not through me, but we could not ship the cars unless we paid, that being the rule.

Q. Do you remember of shipping those small metal wheels to the defendant company about March, 1888?

A. I do.

Q. The petition claims that those wheels were worth $3.96. Was that a reasonable price for the wheels?

79 A. It was; that was the practical cost.

Q. Mr. Sessions, who was present at the time of the inspection you have detailed by Mr. Lawless of these cars?

A. There was Mr. Rapp, chief designer for the Pullman Com-

pany; Mr. Jacobs, assistant foreman of the works; Mr. Manier, who is assistant superintendent of the works, and Mr. McLean, who was foreman of the iron department or machine department.

By Mr. PRATT:

Q. Foreman of what?

A. The iron and machine department; and Mr. Lawless and myself; and Mr. Charles Pullman was there a part of the time.

Cross-examination.

By Mr. PRATT:

Q. Mr. Sessions, how long have you been in the employ of the Pullman Company?

A. Since three years ago last December.

Q. In what capacity?

A. Well, as assistant manager, superintendent, and at the present time manager of the works.

Q. You are manager of the works?

A. Yes, sir.

Q. What were you doing the time these cars were being constructed?

A. I was manager at that time.

Q. How extensively are the Pullman Company engaged in the manufacture of cars?

80 A. Well, I should say quite extensively.

Q. How many men do they employ, about?

A. Well, nearly four thousand men, all told, in the car works.

Q. How many cars do they make a month, or a year?

A. What class of cars?

Q. All classes.

A. From six to seven thousand freight cars, from one hundred to one hundred and fifty sleeping cars, and four hundred to five hundred passenger cars.

Q. You are speaking now of the year?

A. For the year.

Q. How many street cars?

A. Oh, from four to five hundred, I should say, without looking at the records.

Q. Do they have a seperate department for the manufacture of street cars?

A. It is in a separate building.

Q. All under the same management and control?

A. Yes, sir.

Q. How long have they been engaged in the manufacture of street cars?

A. I can only say for three years and a half, but for some time before that.

Q. But you have known of it yourself for three years and a half?

A. Yes, sir.

Q. Was this the first lot of cable cars they ever constructed?

A. I think not, sir.
Q. You think not?
A. I think not.

Q. It was not the first lot of street cars that they had
81 manu-tured?

A. No, sir.

Q. How many cable cars had they constructed prior to this time?
A. I could not say without reference to the records.
Q. Didn't you make some other combination cars before that time?
A. Yes, sir; I think there were some built in the shop there before that time.
Q. Weren't there some built while you were manager?
A. I think there were.
Q. For what company?
A. I think there were two cars only built for a St. Louis company.
Q. You did build some for a St. Louis company?
A. Yes, sir.
Q. Mr. Sessions, you had charge of the construction of these cars, hadn't you?
A. Yes, sir.
Q. For what purpose were they to be used?
A. For cable street cars, I suppose.
Q. For cable street cars—that is, for street cars, the motive power of which was one of these endless cables?
A. Yes, sir.
Q. What line were they to be used for?
A. My record shows simply for the Metropolitan street railway.
Q. Yes; but what line were they to be used for that you knew?
A. I don't think there is anything in my record to show what line.
Q. I am not asking you what your records show.
—. I don't know anything about what line they were for.

Q. You don't know anything about what line they were for?
82 A. No, sir.

Q. Didn't you ever hear about the 12th street line?
A. I have heard the line mentioned.
Q. Did you ever come here prior to the commencement of the construction of those cars?
A. I never have been in Kansas City before today, sir.
Q. Oh, yes; I was thinking of Mr. Twyman. Well, now, Mr. Sessions, in regard to the inspection which you speak of in your direct testimony, which you say Mr. Lawless, the superintendent of the Metropolitan, made at the shops; I think you said it was made somewhere about the last of December.
A. The 29th or 30th of December, 1887, to the best of my recollection.
Q. How many cars did you say were ready for shipment at that time?
A. I think from twelve to fifteen cars.

Q. You think from twelve to fifteen cars were ready for shipment at that time?

A. Yes, sir.

Q. Ar'n't you mistaken in that? Ar'n't you very much mistaken as to the number?

A. I think not; I think the cars were ready for shipment; but we discovered some defects in the panel—some cracking—and they were held for replacing the panel.

Q. But ar'n't you mistaken as to the number that were ready there?

A. Really, on my memory, I think there would be at least twelve cars.

Q. Well, if you had twelve cars ready at that time, why were they not shipped?

83 A. That I am not prepared to answer.

Q. That you couldn't tell?

A. That I couldn't say.

Q. Do you know the times the cars were shipped from the works there to Kansas City?

A. I have not in my mind all the dates, but I have a record of it.

Q. But you have no copy of the record here?

A. There is a copy here with the papers, I believe.

Q. Well, have you got a copy of the record here?

A. Not here, sir.

Q. Have you got anything from which you can tell the time they were shipped?

A. Not here.

Q. Well, then, you can't tell when those cars were shipped to Kansas City, or what numbers of them were shipped at a time?

A. Not positively.

Q. Well, now, were any cars at all shipped until towards the last of February, nearly two months after you say this inspection took place of these twelve or fifteen that were ready for shipment?

A. It was some time in February; I don't know exactly.

Q. Do you know how many were shipped at that time?

A. My recollection is that five were shipped the first time.

Q. Five were shipped, then, along in the latter part of February. Well, if there were twelve or fifteen ready the latter part of December, why were only five of them shipped along in the latter part of February?

A. Owing to some detail of shop-work which I couldn't answer at the present time.

84 Q. Do you know the fact that you were constantly being requested by the Metropolitan Company to ship the cars on here?

Objected to as incompetent, irrelevant, and immaterial, the defendant not having made the matter of time any reason for rescinding.

By Counsel for Defendant: We don't make any question on

that point. We don't raise any question as to there being a breach of the contract in not delivering on time, and this examination has no reference to that.

By Mr. RUNNELLS: Plaintiff also objects because the testimony called for by this question is shown by written letters.

By Mr. PRATT: I asked him if he knew the fact that we had written letters, and perhaps it will be in order for me to ask you now for those letters which we gave you notice to produce here, but I won't stop the cross-examination of Mr. Sessions now, though we shall want them before we get through.

Q. Now, Mr. Sessions, with regard to the inspection of those cars, which you say Mr. Lawless made, where were those cars at the time of the inspection?

A. They were in the street car shop.

Q. What were they on, a track?

A. They were on a plank flooring.

By Mr. RUNNELLS:

Q. Just by way of getting the fact accurately, they were resting upon rails, were they not, upon the flooring?

A. If they were resting on rails, they would be level with the floor anyway, though I think they were not.

85 By Mr. PRATT:

Q. Now, I wish you would detail again, because this may be rather an important question, just exactly how Mr. Lawless inspected those cars.

A. He got on the floor and looked under the car, while one of our men was working the brake-lever inside of the car.

Q. Were the cars stationary at that time?

A. They were.

Q. Were they stationary during all the time that he inspected them?

A. They were.

Q. They were not moved at all?

A. No, sir.

Q. Did Mr. Lawless see those cars in motion at any time there?

A. I can't say that he did. I didn't see.

Q. I assume that in speaking of this inspection you are telling just what you saw?

A. Yes, sir.

Q. Then the cars were not moved at any time while Mr. Lawless inspected them, as you have detailed?

A. No, sir.

Q. And all the inspection of those brakes was, he got under the car to look at them, while one of your men got inside and pulled the brake-lever?

A. I didn't say that was all the inspection.

Q. I am referring to the brakes.

A. He reached under the car and tried the levers from under the

side of the cars. He also, with a small steel bar, tried the tension of the lever to see how the shoes rested against the wheels when the brake-lever was set in the car.

Q. The cars were not moved during that time?

86 A. No, sir.

Q. Either forward, backward, or attempted to be moved around the curve, or anything of that kind?

A. No, sir.

Q. I think you said you were never here before, Mr. Sessions?

A. Yes, sir.

Q. Well, I will leave, then, the cross-examination here. If we don't agree with regard to the letters, of course I will have to put Mr. Sessions on again.

By Mr. BURRY:

Q. Mr. Sessions, was any request made by Mr. Lawless for the cars to be moved or run out on the rails during his inspection?

A. No, sir.

Q. Were all the opportunities that Mr. Lawless asked for in the way of inspection afforded him?

A. Yes, sir; we did everything he asked for.

Counsel for defendant objects and moves to strike out the question and answer as calling for a conclusion. Just let him state what Mr. Lawless asked for. Objection sustained.

Q. Did you deny any request of Mr. Lawless looking towards the the inspection of the cars?

A. No, sir.

(Witness excused.)

By Mr. RUNNELLS: If the court please, we have a witness here who is a non-resident, living at some distance — here and from Chicago, whose testimony would properly be testimony in rebuttal; but by the courtesy of my friends on the other side I am permitted, with the court's consent, to call him now.

87 GEORGE RICE, called on the part of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Mr. BURRY:

Q. Please tell your full name, residence, and occupation.

A. George Rice; my residence is Pottstown, Pennsylvania.

Q. What is your occupation?

A. Civil engineer.

Q. Are you connected with any street or railway service?

A. Of the Citizens' Traction and Central Traction Companies of Pittsburg.

Q. What is your relation to them?

A. I am their engineer.

Q. Were you in Kansas City in June, 1888?

A. Yes, sir.

Q. At that time were you at the works or shops of the Metropolitan Street Railway Company?

A. I was at their power station on 12th street.

Q. While there did you see stored or standing upon their tracks quite a number of combination cable cars?

A. Yes, sir.

Q. Built by the Pullman Company?

A. Yes, sir.

Q. About how many were there?

A. That I don't know; there was quite a number of them.

Q. In whose possession were they or control?

88 A. I presume they were in the possession of the Metropolitan Company; they were in their shops or house.

Q. Did you meet any person connected with that company at that time?

A. There was a gentleman there that showed us around.

Q. Who was with you?

A. Mr. John G. Holmes and Mr. James G. Vernon, one of the directors of our company.

Q. What were you here for?

A. We visited the different cable roads to see what kind of cars to adopt for our own road.

Q. Did you examine these cars at the Metropolitan Company's house?

A. We got into them and looked around about them, as with other cars.

Q. Well, why did you do that?

A. Well, to see what kind of cars were in use on other roads.

Q. Did you have any conversation about them with this person in charge of the place?

A. On arriving, we asked permission to look around, and we were referred to a gentleman there.

By Mr. PRATT:

Q. Was it somebody in the power-house?

A. In the power-house and connected with the car-barn.

By Mr. RUNNELLS:

Q. Did you have any conversation with him in regard to these cars?

Objected to as incompetent, irrelevant, and immaterial and because it is not shown that this person with whom the conversation
89 is had had any authority to speak for the company.

By the COURT: That would depend upon their object.

By Mr. BURRY: We expect to prove that the witness was told by this company that the cars were for sale by the Metropolitan Company, and that they could be had cheap and were good in every respect.

By the COURT: Don't it become important as to who makes that statement?

By Mr. PRATT: If you wish to show by him that any officer of the Metropolitan Company offered to sell him those Pullman combination cars in June, 1888, I will make no objection whatever.

By Mr. BURRY: That is what I am trying to prove.

Q. Who referred you to this man?

A. Some men about the works: I don't know who they were.

By Mr. PRATT:

Q. Some of the men about the works?

A. Yes, sir; men working around there.

By Mr. BURRY:

Q. Was this their principle power-house or principle place of business?

A. That was thei- power station.

Q. Were there many around?

A. Oh, they were working around there; the road was in operation, but they were still working around in the rear portion of the house.

Q. What position did this man with whom you had this conversation occupy there?

A. I can't say what position he held. He would have the
90 position of a superintendent of that station if the road was organized as our road is.

Q. Was he the man in charge of that place?

A. I presume so from the fact that he had been referred to us, and he showed us around very politely.

Q. Was he in charge of any men there who were engaged in operating the road? Did he give directions *of* any of them?

A. Not while I was there.

Q. Did he give directions to any men while you were there?

A. No, sir.

Q. Who referred you to him, do you say?

A. We just asked the first man we saw whether we could go in there.

Q. The first man you saw working there?

A. Yes, sir.

Q. What was he working at?

A. Oh, they were standing around there working, and we didn't want to go in without asking permission, and they referred us to this person—pointed to him.

Q. Did this man show your party around the premises?

A. Yes, sir.

Q. Did he show you into these cars?

A. Yes, sir.

Q. Were the cars locked or fastened in any way?

A. No, sir; at least not the car we were in. I don't know that we went into more than one car.

Q. Did he have the keys to any cars or to any part of the building?

A. Whether he had or not I don't know. He had no necessity for using any keys.

90½ Q. Did you find him in an inside office in the building or around among the men?

A. No; my recollection is that he was standing right in amongst the tracks in the car-barn.

Q. Were the cars running out and in there at that time?

A. Not that I remember of.

Q. Was the road in operation?

A. The road was in operation, but I don't remember of any cars running in and out of the car-barn.

Q. Would that be the regular place for them to run, in and out on that road?

A. I think so. I don't know any other place.

Q. Were the engines or power situated there?

A. Yes, sir.

Q. The machinery was in operation?

A. Yes, sir; we rode over the road.

Q. With whom, this man?

A. No, sir; Mr. Vernon, Mr. Holmes, and myself.

By Mr. BURRY: I think this shows that he was the man in charge of that place, and that a man of that authority in the witness' company would be a superintendent of those works.

By COUNSEL FOR DEFENDANT: We object to any evidence as to what this man may have said as incompetent, irrelevant, immaterial, and hearsay, and because no authority is shown.

By the COURT: Further testimony may show who the gentleman was that made such statements, but if this were the only testimony I am free to say that it would not be sufficient.

91 By Mr. RUNNELLS: I respectfully submit that as this testimony is now taken out of place that their motion to strike out be not sustained at present; but the testimony need not be considered if we should fail to establish any proper connection between the person who gave the information to Mr. Rice and the company.

By Mr. PRATT: Just consider the objection in, to be ruled upon when the plaintiff gets through with its testimony.

Q. Was anything said to you by that man as to whether or not the cars were for sale?

A. Yes, sir; he said the cars were for sale.

Q. Was any price mentioned?

A. No, sir.

Q. Any remark made concerning prices?

A. No, sir; except they could be had at a bargain.

Q. Did you enquire into the condition or state of the cars?

A. I did not; Mr. Holmes did. I was there.

Q. Did the man answer?

A. Yes, sir; he said the cars were too wide and too heavy for the company, but in other respects were a good car. He went into no details about them.

Q. How long have you been engaged in connection with street cars or cable-car companies?

A. Since 1883, with an interregnum of a year or two when I was not.

Q. You are now engineer of two traction or cable-road companies?

A. Yes, sir.

Q. How many cars do they operate?

A. The Citizens' Traction Company is operating forty
92 cars and the Central is being constructed.

Q. Referring to those Pullman cars that you saw at that power station, what do you think of them as being adaptable to a cable line with heavy and sever-grades and many curves?

Objected to as incompetent, irrelevant, and immaterial. Question withdrawn.

Q. I will ask one question more, then: Were those cars well built cars?

A. I can't say as to that.

Cross-examination.

By Mr. Pratt:

Q. Mr. Rice, what time in June, 1888, was that you were there?

A. The third of June, sir; it was Sunday.

Q. Where was that power-house that you were in and saw these cars?

A. Well, it was on their road and on the corner of a street.

Q. On the corner of the street, on the line of the road?

A. Yes, sir.

Q. Do you know which road?

A. On Twelfth street.

Q. How many of those combination cars with the Pullman's name on did you see? I understood you to say that you saw some combination cars with their name on.

A. I can't say that I saw more than one that had their name on. I was only in one car.

Q. And you have no recollection of seeing more than one?

A. There were other cars like that.

93 Q. That is, you mean other combination cars?

A. Yes, sir.

Q. With the Pullman name on?

A. That I don't know. I was not in them.

Q. You simply know that there were other combination cars there?

A. Yes, sir.

Q. How many?

A. I couldn't tell you, sir. I paid no attention to them at all at the time.

Q. Do you think there were twenty-five combination cars there at the time?

A. I don't know.

Q. In other words, you don't know anything about it, only the one you saw?

A. I know there were some other cars there, but how many I don't know.

Q. Do you know whether there were other combination cars there than you looked at?

A. Yes, sir; there were; and I think there were Laclede cars also.

Q. Look at these three gentlemen sitting on this seat here (referring to C. F. Morse, W. B. Knight, and R. J. McCarty). Did either one of these gentlemen there ever tell you that those cars were for sale?

A. No, sir.

Q. Have you ever seen any of these gentlemen before?

A. I have had the pleasure of meeting Mr. Knight, and the other gentlemen I don't know.

Q. It was not Mr. Knight?

A. No, sir.

Q. Nor was it either of the others?

A. No, sir.

Witness excused.

94 AUGUST RAPP, called on the part of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. BURRY:

Q. State your name, residence, and occupation.

A. August Rapp; residence, Pullman, Ills.; occupation, chief designer and inspector for the company.

Q. Do you remember Mr. Lawless, a superintendent of the Metropolitan Company, being at Pullman to inspect certain cars about the end of December, 1887?

A. Yes, sir.

Q. Do you remember about how many cars were then ready for inspection by him?

A. I should say there were from 10 to 15 cars, but positively the exact number I couldn't state, but from 10 to 15 cars.

Q. Were you present during the inspection made by Mr. Lawless?

A. Yes, sir.

Q. Explain how he inspected them, as fully as you can.

A. When Mr. Lawless went inside the car we went in together, and we looked around about the car inside; tried the door, lifted the window, the blind, and from there we went to the open part of the car and he tried the levers of the brake, and he looked the ground over—that is, the position where the gripman would be—and he made the remark that the lever of the brake was too far distant, too far away from the lever of the grip, and that it would be necessary to bring it closer to the grip-lever, which could be accomplished by bending the lever; that we undertook to do imme-

diately, and we went off the car and looked on the outside
95 while the man went on and tried the brake-lever, and Mr. Lawless was on the side of the car watching the movement of the brake-shoe.

Q. Did he get down to look under?

A. Yes, sir; and he went with a small chisel bar or something to try to see whether the bite was sufficiently tight to satisfy himself.

Q. What was done about bending the lever?

A. The bending of the lever was then immediately, while he was there, done, and it was put in again, and when it was put in position to try there was another little defect in it, simply the shape of the handle of the lever, which had to be bent a little more, so that in pulling the lever back the hand would not slip off; and that was done, and then, after he tried that, he gave the instructions or said, in so many words, that this was now all right and we could proceed and have all the levers fixed in that way.

By Mr. PRATT:

Q. What was all right?

A. The brake-lever.

By Mr. BURRY:

Q. What did he say of the cars? Did he make any other criti-
m on them?

He seemed not to find anything wrong about the car. One
he made was, he didn't like the combination car; he didn't
combination car; it was not his car; it was not the car
ed, or something in that line.

Was this change in the shape of the brake-lever that Mr. Law-
scribed made on the other cars?

Yes, sir; it was made on all cars—that is, for all cars.

Q. On all those twenty-five?

A. Yes, sir.

Q. Did you hear Mr. Lawless say anything about the in-
ection of the other cars not yet completed?

A. I heard Mr. Lawless say, "If you fix them like this, that would be all that is wanted."

Q. Did he say whether or not he would come back to inspect the balance of the cars?

A. No, sir; I didn't hear him say that.

Q. Did he say anything about shipping the cars?

A. When these cars are fixed in that way, by having these levers fixed that way, we could ship them.

Q. Were the cars that were subsequently completed—they were not then completed, were they—built and completed in all respects like the ones that were inspected?

A. Exactly like the first one.

Cross examination.

By Mr. PRATT:

Q. Mr. Rapp, are you positive that there were at least ten of those cars?

A. I said from ten to fifteen cars.

Q. You are sure there were at least ten?

A. Yes, sir.

Q. And from that up to fifteen?

A. From ten to fifteen cars standing close by in the shop.

Q. What did you say your business was?

A. Designer and inspector of the works.

97 Q. Did you have anything to do with the shipment of the cars?

A. No, sir.

Q. You have detailed, have you, all that Mr. Lawless did with regard to inspecting the cars?

A. I have; yes, sir.

Q. Now, Mr. Rapp, you say that Mr. Lawless asked to have the brake-lever changed—that is, bent—as I understand it?

A. Yes, sir.

Q. That was done, was it?

A. That was done; yes, sir.

Q. You heard Mr. Sessions' testimony, did you?

A. Yes, sir.

Q. It was done as Mr. Sessions stated, was it—that is, the lever was changed?

A. The lever was changed.

Q. What was the effect of changing that lever?

A. The effect of the lever was exactly as the effect befo[illegible]ief de-changed. There was no difference.

Q. The effect of the lever was not changed?

A. It was not changed. [illegible]Met-

Q. But it simply made it more convenient for use? [illegible]thout

A. Made it more convenient for the position that he held the grip.

Q. It didn't change the operation? [illegible]or

A. No, sir.

Q. Of the brake or lever, but simply made it more convenient for use?

A. More convenient for use; yes, sir.

Q. Did Mr. Lawless make any request for facilities in the

98 inspection of those cars that was denied, that was not complied with?

A. He made the request that a box should be put under the seat, which was put under in all the cars—a box for holding all oil-cans, tools, etc.

(Witness excused.)

ABRAHAM L. JACOBS, called on the part of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. BURRY:

Q. Please state your full name, residence, and occupation.

A. Abraham Lincoln Jacobs; am foreman in the street-car department of the Pullman Company, at Pullman, Ills., and live at Pullman.

Q. Do you remember of an inspection made by Mr. Lawless of a lot of twenty-five street cars built for the Metropolitan Street Railway Co.?

A. I do.

Q. In the latter part of December, 1887?

A. It was along about the 30th of December, as near as I can recollect.

Q. Were you present at all that interview and inspection?

A. No; not at all of it.

Q. Did your duties call you into the place where it was made?

99 A. I was all around there attending to my work, and hearing what was going on a great many times.

Q. Did you see Mr. Lawless make the inspection?

A. I seen Mr. Lawless try the brake-lever. I seen Mr. Lawless watch the brake-shoe while a man in the front end of the car was operating the brake-lever.

Q. Did you see him inspect the inside of the car?

A. I seen him inside of the cars. I was not in myself with him.

Q. Did you hear what he said about his inspection, whether it was satisfactory or not?

A. I heard him say that he didn't like the idea of the brake-lever being straight; that he wanted to bend it.

Q. Was it bent finally to suit his views?

A. Yes, sir; it was; and taken off the second time and bent and put back.

Q. Did he find any other fault with the cars that you heard?

A. Not that I heard.

Q. What did he say about the cars, whether they were good or not?

A. I didn't hear him say.

Q. Did you hear him say anything about shipping them?

A. No.

Q. Did you hear him make any remarks about the cars, except the lever?

A. I heard him say after the lever was bent that the lever was all right, and to go and bend the rest of them like it.

Q. Was there anything else that you heard him say, if at all?

A. No, sir.

100 Cross-examination.

By Mr. PRATT:

Q. Mr. Jacobs, I think you said you were foreman of the street-car department?

A. Yes, sir.

Q. What was the effect of changing that lever as Mr. Lawless asked to have it changed?

A. The only effect I understood the change would have, it was too far forward, and the gripman had to reach over too far to reach it.

Q. Did it change the effect of the brake at all?

A. No, sir.

Q. But simply made it more convenient for the man handling it?

A. Yes, sir.

Q. You have stated all that you saw of Mr. Lawless inspecting those cars; you have stated all that he did and said?

A. Well, I wasn't around there all the time; I was back and forth, but that is what I heard.

Q. You have stated all that you heard and all that you saw, have you?

A. Only I heard him state that it was all right—satisfactory.

Q. That is, if they would change the lever?

A. If they would change the levers.

(Witness excused.)

101 C. L. PULLMAN, called on the part of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. RUNNELLS:

Q. Where do you live, Mr. Pullman?

A. Chicago, Ills.

Q. What is your position?

A. I am contracting agent for the Pullman Company.

Q. How long have you been so employed?

A. About two years in that position.

Q. Do you know Mr. Lawless?

A. I do.

Q. The former superintendent of the Metropolitan Street Railway Company, I believe?

A. Yes, sir.

Q. Did you know him prior to the 29th of December, 1887?

A. I did; yes, sir.

Q. Did you see him on the 29th or 30th of December; and, if so, where?

A. I saw him at the works of the Pullman Company, at Pullman, Ills., on the 29th of December, 1887.

Q. What were you and he doing on that occasion?

A. He came to our works for the purpose of inspecting some cars we were building for the Metropolitan Street Railway Company in

this city, and I went with him to Pullman—from Chicago to Pullman—where he inspected these cars.

102 Q. How many cars were inspected by Mr. Lawless?

A. Well, I should say from ten to fifteen or twenty; somewheres there. I know there was in the neighborhood of twenty-odd cars in the shop at the time, and I think there were over ten and possibly fifteen. I don't know exactly; I know there were more than ten——

Q. That were very near completion?

A. Yes, sir.

Q. Now, will you please state, Mr. Pullman, what Mr. Lawless — by way of inspecting the cars?

A. Well, we looked through the cars together—through a number of them. I can't state just how many.

Q. What do you mean, Mr. Pullman—please state a little more fully—by "looked through"?

A. I mean looking over—that would, perhaps, be better—or looking at the cars. I should say as many as eight or ten, or perhaps twelve, and in examining the different features of the cars—raising the windows and seeing that the sashes worked all right; examining seats, and finally went on to the front of the platform, or open part of the car, and there examined the brake-levers, the arrangement of the levers as compared with where the grip-lever would come, and the sand-box, and the place where the — was to rest, and the brakes. He objected; he made the remark that the brake-lever was too far forward in the position we had placed it at the time—that is, the gripman would have to take two steps forward in order to reach that. Then the question was talked over there as to moving that lever back, and one of the men—I think it was Mr. Sessions; I wouldn't be positive about that—got down into what is termed the grip-well to see if it was possible to move that

103 lever so as to bring it nearer where the gripman would stand.

Q. Now, you say he got down to see whether it was possible to move that. Was the first inquiry directed to the removal of the rod or bar on which the lever worked?

A. Well, that is what I had reference to, where the grip-lever is attached to the frame of the car; and it was determined that that could not be done in that way; and then he suggested making that lever in the shape of a goose-neck—rounding it up.

By Mr. PRATT:

Q. Was that with reference to having the lever so that the gripman wouldn't have to step so far forward?

A. Yes, sir.

Q. It was all with reference to that?

A. Yes, sir.

By Mr. RUNNELLS:

Q. Did you state the reason why the rod on which the lever rested was not moved back?

A. No; I did not. The reason for that was that the bearing or

casting, underneath the car would have to be cut away, consequently destroying the wheel casting, or what we call the truck casting, that fits down into the car under the truck itself.

Q. Well, after abandoning that, what other device was adopted to bring the handles nearer together?

A. Well, he suggested the changing of the lever.

Q. The crooking of it?

A. The crooking of it; the goose-neck, as he called it. After that conversation was had—shortly after that—I had business away and went away and left Mr. Lawless, Mr. Rapp, and Mr. Sessions at the works at the street-car shop, and I went up into town, up to
104 the *up to the* hotel. Oh, no; before that, however, before I left there, Mr. Lawless got down at the side of the car and one of our men operated the lever to see how it worked the brakes, and he made a suggestion or two, which I don't know exactly what it was, any more than it was the adjustment of the rods in some manner, and then I left there—no, I am wrong there; and then, at that time, I spoke to him and say, "Well, how is it, Mr. Lawless?" "Well," says he, "with that lever fixed as they propose to do now, it is all right." Says I, "How do you like the cars, anyway?" and says he, "The cars are all right; but you know that ain't the kind of a car I want." And so then I left that part of the shop and met him later; I don't remember whether it was at the hotel or on the train. He remained to see that this brake-lever was put in; and we met again within an hour or two after that, or not to exceed two hours, and I asked him if they had got the lever fixed to suit him, and he said they had; it was all right, and it would not be necessary for him to come and inspect the balance of the cars; and there also he said that the road would not be open for—giving the date—I don't remember what it was, but it was considerably later than we had expected, and so the cars would be in plenty of time.

Q. You say he said the cars were all right, save that that was not the class of cars that he wanted?

A. Well, he made this remark as near as I can remember it: Says he, "You know that was not the kind of a car I wanted."

Q. Did that refer to the quality of the car or the class of the car?

A. No; the style of the car.

Q. You have seen that, Mr. Pullman (handing witness Exhibit One)?

A. Yes, sir.

Q. I find here in the specifications, "Seats and backs same
105 as the 16-ft. cars recently built." I will ask you whether or not those cars had longitudinal or cross seats.

A. They had longitudinal seats.

Q. How were the seats constructed in these cars in controversy?

A. They were cross-seats.

Q. Why were the cross-seats put in?

A. They were put in at the request of the railway company.

Cross-examination.

By Mr. PRATT:

Q. Mr. Pullman, you are contracting agent for the company, aren't you?

A. Yes, sir.

Q. How long have you been such?

A. I have held that position about two years.

Q. You have been with the company a good many years, haven't you?

A. Yes, sir.

Q. You were contracting agent at the time this contract was made with the Metropolitan Company?

A. Well, not exactly that title, Mr. Pratt. I was general agent at that time, but those were my duties.

Q. And you had the duties of contracting agent?

A. Yes, sir.

Q. You are the person who came on here and put in a bid for these cars?

A. Yes, sir.

Q. Now, Mr. Runnells has asked you with regard to this description here of the seats: "Seats and backs same as 16-ft. cars recently built." I understand you to say that he asked you what the
1095 seats were in those cars, whether they were logitudinal or across the car?

A. Yes, sir.

Q. And you said they were longitudinal?

A. Yes, sir.

Q. Now, I will ask you if at the time you put in your bid for those cars you didn't understand that these seats were to be cross?

A. I did not.

Q. Did you have any conversation with Col. Morse or Mr. Knight or Mr. Lawless with regard to whether those seats should be longitudinal or across the cars?

Objected to as incompetent, irrelevant, and immaterial.

By Mr. PRATT: They have asked Mr. Pullman what the seats were in the other cars; they have asked him to explain one portion of these specifications. Now, our claim is that there is absolutely nothing in this contract, one way or the other, as to whether those seats should be lengthwise of the car or across the car; and it may not be amiss to state that there is correspondence here with reference to cross-seats, and an express statement and agreement from the general manager of the plaintiff company that if Mr. Pullman said that he had agreed with the officers of the Metropolitan Company prior to making this contract that the seats should be put in crosswise instead of lengthwise they would make no extra charge for it. In view of that and the question counsel just asked Mr. Pullman, I was asking him whether or not he had any conversation with Mr. Morse or the officers of the Metropolitan Company as

to how those seats should be put it. We contend that this
107 specification don't necessarily mean that the seats shall be put in lengthwise. Of course, if we don't follow it up and show that letter from them, then, as a matter of course, it will be stricken out.

By the COURT: We are inclined to think that the testimony is competent, with that statement of what is expected to be proven.

Q. Mr. Pullman, did you have any conversation with either Mr. Knight, Col. Morse, or Mr. Lawless with reference to whether those seats in these combination cars to be built by the Pullman Company should be crosswise or longitudinal?

A. I did.

Q. What was it?

A. That was a question that they were not fully decided upon at the time that we had the first conversation in regard to how they did want them.

Q. With whom was that conversation?

A. With Mr. Knight and Col. Morse and Mr. Lawless.

Q. With all three?

A. With all three.

Q. What was the substance of that conversation?

A. The question of the cost of supplying the cross-seats over longitudinal seats was discussed. I didn't have the data to make them a price on the car with cross-seats, so it was arranged that inasmuch as I had made the price $2,000, that the cars were to be built with longitudinal seats of a certain width. If they decided that they wanted the cross-seats, the Pullman Company would apply them at the extra cost of applying the cross-seats. That was the conversation, as near as I remember it. That was fairly—that was certainly my understanding of it.

Q. Didn't they tell you that they had decided to have cross-seats?

108 A. They had not then.

Q. They had n't then decided to have cross-seats?

A. No, sir.

Q. So, at the time you put in your bid and at the time it was accepted and at the time you left here, they had not decided whether they wanted cross-seats or longitudinal?

A. No; and, further, in view of that fact that they were not decided, I said, "Then, I will make a memorandum in the specifications, 'the same seat,' to identify it 'as cars built for your line on lot No. 515.'"

Q. Did you make those specifications?

A. No, sir; I did not; only that *then* was part of my language—part of my memorandum.

Q. When you made it that way you had reference to the seats being longitudinal?

A. Yes, sir.

Q. To purely longitudinal seats and not crosswise the cars?

A. Yes, sir; and we were also talking about leaving them rattan; that would reduce the cost of the car an appreciable amount.

Q. Did you have any conversation alone with Mr. Knight about that fact, as to whether the seats should be longitudinal or crosswise?

A. Oh, yes, sir.

Q. Didn't Mr. Knight tell you that he wanted them crosswise?

A. Yes, sir; he did; and Col. Morse, if I remember right, was not fully decided then. Mr. Knight, from the start, wanted cross-seats, and I talked with Mr. Lawless and he was opposed to it, and then, in order to get the order and get it into work, I suggested that we make the contract based upon that, and whatever the
108½ extra charge was—if there was any extra—whatever the extra charge would be, it would be as an extra against the cars. It was not certainly included in that price.

Q. Well, Mr. Pullman, you knew that this was for the Twelfth-street line, didn't you?

A. Yes, sir.

Q. You looked over the profiles?

A. No; they didn't have—I wouldn't, anyway, naturally——

Objected to as incompetent, irrelevant, immaterial, and not cross-examination. Objection overruled. Plaintiff excepts.

Q. What did you examine while you were here? Did you examine the profiles and maps?

A. No.

Q. Did you go over the line?

A. No, sir; I did not; but I knew in a general way.

Q. You knew in a general way about its running up an incline?

A. Yes, sir.

Q. And about the curves?

A. Knew in a general way; yes, sir.

Q. And about the grades?

A. Why, in a general way, I knew about this grade at Twelfth street.

Redirect examination.

By Mr. RUNNELLS:

Q. Mr. Pullman, which is the more expensive car, one fitted with longitudinal or cross seats?

A. Why, the cross-seats, by considerable.

109 By Mr. PRATT:

Q. One thing I want to ask you: who is George F. Brown?

A. He is general manager of the Pullman Company.

Q. And he was at the time this contract was made?

A. Yes, sir.

Q. And during the construction of these cars?

A. Yes, sir.

Q. Who was A. Twyman?

A. He is engineer.
Q. And was at that time?
A. Yes, sir.
Q. Who was the auditor?
A. F. C. N. Robertson.
Q. He was first assistant auditor at that time, was he?
A. Yes, sir.
Q. Mr. Pullman, won't you look at this; those are the blanks that the Pullman Car Company used for certificates of inspection and acceptance, are they?
A. Yes, sir.
Q. And the kind that you used at that time, too?
A. Yes, sir.

Plaintiff here offers in evidence two letters written by Knight & Bontecou, engineers of defendant company, to H. H. Sessions, manager of plaintiff company, both dated December 5th, 1887, one in reference to ordering extra gongs put upon the cars, a copy of which is hereto attached and marked "Exhibit 3," and the other ordering two extra sand-boxes upon each car, a copy of which is hereto attached and marked "Exhibit 4."

Plaintiff rests.

110 *Defense.*

And thereupon defendant, to maintain the issues on its part, offered the following evidence:

Defendant now offers in evidence all the correspondence between the parties which has not already been introduced, copies of which are hereto attached, marked as hereinafter set forth:

Letter from Knight & Bontecou to Charles L. Pullman, dated May 13th, 1887, marked "Exhibit 5."

Letter from George F. Brown to Charles F. Morse, dated June 21, 1887, markes "Exhibit 6."

Letter from Knight & Bontecou to George F. Brown, dated June 27, 1887, marked "Exhibit 7."

Letter from George F. Brown to Knight & Bontecou, dated June 27, 1887, marked "Exhibit 8."

Letter from George F. Brown to Knight & Bontecou, dated June 30, 1887, marked "Exhibit 9."

Letter from Knight & Bontecou to George F. Brown, dated June 30, 1887, marked "Exhibit 10."

Letter from Knight & Bontecou to George F. Brown, dated July 2, 1887, marked "Exhibit 11."

Letter from George F. Brown to Knight & Bontecou, dated July 6, 1887, marked "Exhibit 12."

Letter from George F. Brown to Knight & Bontecou, dated July 13, 1887, marked "Exhibit 13."

Letter from Knight & Bontecou to George F. Brown, dated July 18, 1887, marked "Exhibit 14."

Letter from Geo. F. Brown to Knight & Bontecou, dated July 19, 1887, marked "Exhibit 15."

Letter from A. Twyman to Knight & Bontecou, dated July 20, 1887, marked "Exhibit 16."

111 Letter from George F. Brown to Knight & Bontecou, dated July 22nd, 1887, marked "Exhibit 17."

Letter from Knight & Bontecou to George F. Brown, dated July 22, 1887, marked "Exhibit 18."

Letter from Knight & Bontecou to A. Twyman, dated July 23, 1887, marked "Exhibit 19."

Letter from George F. Brown to Knight & Bontecou, dated July 25, 1887, marked "Exhibit 20."

Letter from Knight & Bontecou to A. Twyman, dated July 27, 1887, marked "Exhibit 21."

Letter from Knight & Bontecou to A. Twyman, dated August 5, 1887, marked "Exhibit 22."

Letter from George F. Brown to Knight & Bontecou, dated August 8th, 1887, marked "Exhibit 23."

Letter from Knight & Bontecou to A. Twyman, dated August 10th, 1887, marked "Exhibit 24."

Telegram from Cha-les L. Pullman to Knight & Bontecou, dated August 12, 1887, marked "Exhibit 25."

Letter from A. Twyman to Knight & Bontecou, dated August 26, 1887, marked "Exhibit 26."

Letter from Knight & Bontecou to Twyman, dated August 31, 1887, marked "Exhibit 27."

Telegram from Brown to Knight & Bontecou, dated August 31, 1887, marked "Exhibit 28."

Letter from George F. Brown to Knight & Bontecou, dated September 2, 1887, marked "Exhibit 29."

Letter from A. Twyman to Knight & Bontecou, dated September 6, 1887, marked "Exhibit 30."

Letter from Knight & Bontecou to A. Twyman, dated September 9, 1887, marked "Exhibit 31."

112 Letter from A. Twyman to Knight & Bontecou, dated September 13, 1887, marked "Exhibit 32."

Letter from Knight & Bontecou to A. Twyman, dated September 15, 1887, marked "Exhibit 33."

Letter from A. Tyaman to Knight & Bontecou, dated October 5, 1887, marked "Exhibit 34."

Letter from Knight & Bontecou to A. Twyman, dated October 8, 1887, marked "Exhibit 35."

Letter from H. H. Sessions to Knight & Bontecou, dated October 8, 1887, marked "Exhibit 36."

Letter from Knight & Bontecou to H. H. Sessions, dated October 12, 1887, marked "Exhibit 37."

Letter from Knight & Bontecou to George F. Brown, dated October 22, 1887, marked "Exhibit 38."

Letter from George F. Brown to Knight & Bontecou, dated October 26, 1887, marked "Exhibit 39."

Letter from H. H. Sessions to Knight & Bontecou, dated October 28, 1887, marked "Exhibit 40."

Letter from Knight & Bontecou to Sessions, dated October 31, 1887, marked "Exhibit 41."

Telegram from H. H. Sessions to Knight & Bontecou, dated November 4, 1887, marked "Exhibit 42."

Telegram from Knight & Bontecou to H. H. Sessions, dated November 7, 1887, marked "Exhibit 43."

Telegram from Knight & Bontecou to H. H. Sessions, dated November 29, 1887, marked "Exhibit 44."

Letter from H. H. Sessions to Knight & Bontecou, dated November 30, 1887, marked "Exhibit 45."

Letter from Knight & Bontecou to H. H. Sessions, dated December 1, 1887, marked "Exhibit 46."

113 Letter from Knight & Bontecou to H. H. Sessions, dated December 2, 1887, marked "Exhibit 47."

Letter from Charles L. Pullman to E. J. Lawless, dated December 3, 1887, marked "Exhibit 48."

Letter from George F. Brown to Knight & Bontecou, dated December 3, 1887, marked "Exhibit 49."

(Letter from Knight & Bontecou to H. H. Sessions, dated December 5, 1887; see "Exhibit 3.")

(Letter from Knight & Bontecou to H. H. Sessions, dated December 5, 1887; see "Exhibit 4.")

Letter from H. H. Sessions to Knight & Bontecou, dated December 7, 1887, marked "Exhibit 50."

Telegram from George F. Brown to Knight & Bontecou, dated December 8, 1887, marked "Exhibit 51."

Telegram from Knight & Bontecou to George F. Brown, dated December 8, 1887, marked "Exhibit 52."

Letter from Knight & Bontecou to George F. Brown, dated December 8, 1887, marked "Exhibit 53."

Letter from George F. Brown to Knight & Bontecou, dated December 9, 1887, marked "Exhibit 54."

Letter from Knight & Bontecou to George F. Brown, dated December 14, 1887, marked "Exhibit 55."

December 16, 1887, letter from George F. Brown to Knight & Bontecou, marked "Exhibit 56."

Letter from George F. Brown to Knight & Bontecou, dated December 22nd, 1887, marked "Exhibit 57."

Telegram from Knight & Bontecou to George F. Brown, dated December 27, 1887, marked "Exhibit 58."

Letter from George F. Brown to Knight & Bontecou, dated January 3, 1888, marked "Exhibit 59."

114 Letter from Knight & Bontecou to George F. Brown, dated January 25, 1888, marked "Exhibit 60."

Letter from George F. Brown to Knight & Bontecou, dated January 28, 1888, marked "Exhibit 61."

Letter from Knight & Bontecou to George F. Brown, dated February 2, 1888, marked "Exhibit 62."

Letter from George F. Brown to Knight & Bontecou, dated February 11, 1888, marked "Exhibit 63."

Telegram from Knight & Bontecou to George F. Brown, dated February 15, 1888, marked "Exhibit 64."

Letter from Knight & Bontecou to George F. Brown, dated February 16, 1888, marked "Exhibit 65."

Letter from George F. Brown to Knight & Bontecou, dated February 17, 1888, marked "Exhibit 66."

Letter from George F. Brown to E. J. Lawless, dated February 23, 1888, marked "Exhibit 67."

Letter from George F. Brown to Knight & Bontecou, dated February 24, 1888, marked "Exhibit 68."

Letter from F. C. N. Robertson to Metropolitan Co., dated February 24, 1888, marked "Exhibit 69."

Letter from George F. Brown to E. J. Lawless, dated February 25, 1888, marked "Exhibit 70."

Letter from Knight & Bontecou to George F. Brown, dated February 28, 1888, marked "Exhibit 71."

Letter from George F. Brown to E. J. Lawless, dated March 1, 1888, marked "Exhibit 72."

Telegram from George F. Brown to Knight & Bontecou, dated March 1, 1888, marked "Exhibit 73."

Telegram to Knight & Bontecou from George F. Brown, dated March 2, 1888, marked "Exhibit 74."

115 Telegram from Knight & Bontecou to George F. Brown, dated March 3, 1888, marked "Exhibit 75."

Telegram from George F. Brown to Knight & Bontecou, dated March 3, 1888, marked "Exhibit 76."

Letter from George F. Brown to E. J. Lawless, dated March 3, 1888, marked "Exhibit 77."

By Mr. HAGERMAN: If your honors please, those cars reached here on the 2nd of March and were hauled up to the power-house, and on March 3rd we find Mr. Knight wiring Mr. Brown that these cars would not go around a curve of 30 ft. radius, and Mr. Brown wiring back that he would make the alterations as requested.

By Mr. RUNNELLS: We interpose an objection to any testimony tending to show or relating to the condition of the cars and their construction after their delivery to defendant, upon the theory that all defects were waived by inspection, and that the duty of the plaintiff was fully performed at that time.

By the COURT: The fact of inspection is yet an open one and rests only upon the plaintiff's evidence.

Letter from F. C. N. Robertson to Metropolitan Co., dated March 3, 1888, marked "Exhibit 78."

Letter from George F. Brown to Lawless, dated March 17, 1888, marked "Exhibit 79."

Letter from E. J. Lawless to George F. Brown, dated March 23, 1888, marked "Exhibit 80."

Letter from George F. Brown to E. J. Lawless, dated March 27, 1888, marked "Exhibit 81."

Letter from F. C. N. Robertson to Metropolitan Co., dated March 27, 1888, marked "Exhibit 82."

116 Letter from A. Twyman to E. J. Lawless, dated March 29, 1888, marked "Exhibit 83."

Letter from George F. Brown to E. J. Lawless, dated March 30, 1888, marked "Exhibit 84."

Letter from F. C. N. Robertson to Metropolitan Co., dated March 30, 1888, marked "Exhibit 85."

Letter from George F. Brown to Charles F. Morse, dated April 5, 1888, marked "Exhibit 86."

Letter from George F. Brown to E. J. Lawless, dated April 6, 1888, marked "Exhibit 87."

Letter from Charles F. Morse to George F. Brown, dated April 11, 1888, marked "Exhibit 88."

Letter from George F. Brown to Charles F. Morse, dated April 13, 1888, marked "Exhibit 89."

Letter from Charles L. Pullman to E. J. Lawless, dated April 23, 1888, marked "Exhibit 90."

Letter from A. Twyman to E. J. Lawless, dated April 24, 1888, marked "Exhibit 91."

Letter from George F. Brown to E. J. Lawless, dated April 28, 1888, marked "Exhibit 92."

Letter from E. J. Lawless to George F. Brown, dated May 3, 1888, marked "Exhibit 93."

Letter from George F. Brown to E. J. Lawless, dated May 7, 1888, marked "Exhibit 94."

Letter from George F. Brown to Charles F. Morse, dated May 8, 1888, marked "Exhibit 95."

Letter from Charles F. Morse to George F. Brown, dated May 12, 1888, marked "Exhibit 96."

Letter from George F. Brown to Charles F. Morse, dated May 17, 1888, marked "Exhibit 97."

All which correspondence is objected to for reasons heretofore stated.

Adjourned until tomorrow at 10 a. m.

117 KANSAS CITY, *April 25th*, 1889—a. m.

The hearing of this case is now resumed, pursuant to the foregoing adjournment.

CHARLES F. MORSE, called on the part of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGERMAN:

Q. What is your name and business?

A. Charles F. Morse: I am president of the Metropolitan Street Railway Company, and have some other business in the city.

Q. Were you president of the Metropolitan Company at the time

these cable cars in controversy were received and attempted to be used by the company?

A. Yes, sir.

Q. Also at the time they were ordered?

A. Yes, sir.

Q. Do you remember of Mr. Charles L. Pullman being here prior to making his bid?

A. Yes, sir.

Q. What, if anything, do you know as to what line these cars were to be furnished for?

A. I presume he must have known all about it, as it was always referred to as the 12th-street line.

Q. From what points did that line extend?

A. From the east city limits, on 12th street, to what we call the bottoms—that is, on Bell street to the stock yards, and back
118 on Genessee street to 12th.

Q. What was the nature of the grade along that line?

A. The maximum grade was between 13 and 14 per cent.; that was on what was called the incline, which runs from the edge of the bluff to the level of the bottoms.

Q. And about how long is that incline?

A. My recollection is that that maximum grade is somewhere about five or six hundred feet long.

Q. Then what other grades are there?

A. There are a number of grades that run up to 10 per cent.

Q. This was a double-track line?

A. Yes, sir.

Q. Well, now, what as to the number of curves there were upon that line?

A. There were a number of curves, particularly on the bottom, where we leave the incline and pass onto 11th street for a certain distance, and then into what we call the loop at that end, which runs on Bell street and Genessee street.

Q. And then on the east end there is a loop, is there not?

A. On the east end there is a small loop running around one block——

Q. And then how about the curve at the power-house?

A. There was a sharp curve, necessarily so, as it curved out from the house in a 60-foot street.

Q. The 12th-street power-house is the house where you keep the cars while they are not in use?

A. It is the power-house and car-house or car-barn.

Q. Something was said yesterday about what Mr. Pullman said or about the understanding you had with Mr. Pullman about whether cross or longitudinal seats were to be put in these cars?

119 A. The question of seats was discussed, and my understanding was, before the contract was signed, that it was fully decided to have those seats if when the cars were designed——

By Mr. RUNNELLS: I object to his giving his understanding.

Objection sustained.

Q. State in substance what was said between you.

A. That was what I meant to say—that it was said at the time that these seats should be cross-seats if when the designer, or whoever had charge of making the plans, came to draw the plans it was found practicable to get them in within the width to which the car was limited, and also to get the seating capacity which was required.

Q. And what about the price of $2,000 covering the cross-seat cars? What I want to know is whether or not the cars with the cross-seats was included in the price fixed of $2,000.

A. There was no reference to any other seats except cross-seats if they were practicable, and the price was made on the basis of what our general talk was. This was in advance of specifications, but the whole matter was talked over, and there was nothing said as to longitudinal seats if the others would fit in the cars and be found practicable when they came to be designed.

Q. These cars—how did they come, all in one lot or in seperate shipments?

A. They came in seperate shipments.

Q. Do you remember about the time when the east end of the line was finished so as to operate the cable so that a car could be run over it?

A. I know that it was some time in the last week or 10
120 days in March; about that time. I couldn't remember the date exactly, but some time prior to the 1st of April.

Q. Well, now, some difficulty was found with the cars at that time. Do you know individually about that, or was that something reported to you by Mr. Lawless?

A. That was reported to me. I don't know about the particular trouble in the first instance excepting the trouble with the brakes.

Q. Do you know whether Mr. Twyman was here at that time—at the time the line was formally opened?

A. He was.

Q. Do you remember about the date that the line was opened and the cars put in service—the whole line, when you got the west end ready?

A. It was, I think, the 10th of April.

Q. Now I hand you Col. Morse's letter of April 11th, 1888, which, as I understand, was written the day after the line was opened so that you could try all of the cars, and ask you to look at it. In that letter something is said that if the Pullmans do not fix these cars you would have to fix them and charge that company with the expense. Will you make any explanation you may desire of that matter?

Objected to as incompetent, irrelevant, and immaterial. The letter must speak for itself. It is in evidence, and whatever construction is proper or necessary to be put upon it the plaintiff must be bound by and not by his explanation of it.

Counsel for defendant states that he desires to show that Mr.

Twyman came here and reported everything right, and then
121 there was still the same trouble, and we wanted to call from Col. Morse that in writing he would charge the expense to the Pullman Company. He had no idea of the difficulty that was in the way, but supposed at that time that it was something that could be easily remedied, and afterwards it was demonstrated, as the testimony will show, that it was absolutely impossible to remedy it.

By Mr. RUNNELLS: If the court please, any subsequent writing to show that fact would be entirely proper, but it seems to me now that this letter goes in evidence as a conversation, for instance, and that the witness can't be permitted to state what his understanding was, but that the letter is to be taken as expressive of the right idea.

By Mr. PRATT: As I stated, we simply want to explain to the court that at the time Col. Morse wrote that letter he did not understand what the trouble was, but supposed it was some simple matter that could be remedied at once.

By Mr. RUNNELLS: I submit that the defree or amount of work to be done would not vary the principle.

Objection sustained. Defendant excepts.

122 Q. After you wrote that letter, Col. Morse, you may state whether or not Mr. Twyman, the engineer of the Pullman Company, came back here and attempted to fix the cars.

A. Mr. Twyman came back within a very short time after my letter was sent, and stated that he had come back to put those brakes in complete order; that those were his instructions; that he was to put them in complete and satisfactory shape.

Q. Well, did he proceed to attempt to do so?

A. I told him that he should have every facility; that he could go to the power-house and employ any man he pleased or do what he pleased; to take the cars in his own charge and do what he pleased.

Q. Now, how long did Mr. Twyman stay?

A. I don't know that I could answer that. I think he came to my office no more after that first interview.

Q. Do you know whether or not he had a mechanic come afterwards?

A. I know he had a mechanic come; he brought him to my office. That mechanic, he told me, had come to take charge of the matter and would stay until the cars were satisfactory.

Q. Well, did they succeed in fixing them so they were satisfactory?

A. They did not.

Q. Well, when was it that you took the cars off the line?

A. It was either the 10th or 11th of May. I have not the date in my mind; it is a matter of record.

Q. At that time had the cars attempted to be fixed by this mechanic been tried?

A. They had been tried repeatedly; as soon as a car was ready it was taken out on the road.

Q. Was the difficulty that you had ever obviated?

123 A. Never obviated for more than one trip.

Q. Now, did you attempt to use and operate those cars? What observations did you make as to their operation?

A. I made constant observations in a general way as to the operation of the cars, but, I might say, nothing as to the mechanical part, because I am not acquainted with such things.

Q. What difficulty, if any, did you see in the operation of the cars?

Objected to as incompetent.

By the COURT: We understand that you object to this whole line of testimony.

By Mr. RUNNELLS: Yes; we object to the introduction of all testimony covering the operation of the cars or anything in connection with them after delivery of the cars here as incompetent, irrelevant, and immaterial. We insist that the inspection concludes the matter, so far as we are concerned, and that everything after the inspection and delivery of the cars in accordance with the contract is objectionable.

Objection overruled. Plaintiff excepts.

Q. Now, Col. Morse, just state what you observed in the operation of the cars.

A. My observation was mainly from the outside of the cars, driving along the side of the car and noticing how the brakes appeared to affect the car on grades and curves.

Q. You speak about driving alongside of the car; what do you mean?

A. Riding on horseback, following along at a little distance, so that I could notice the cars on a particular grade or curve.

124 Q. Well, what was the difficulty, if any, that you saw?

A. Apparently the brake-shoe set up as close as it could bind when it would go onto a grade and when it would take a sharp curve. As it looked to me, it would be impossible to put in a sheet of paper between the shoe and the wheels. I also observed on one curve, the curve on the corner of Genessee street and 16th as it curves into Genessee street—a car came around one day and left the track, so that it was entirely off the track with one truck, and had to be replaced by a large force of men, which appeared to be, as my observation led me to believe, from the brake setting up on the car.

By the COURT:

Q. Do we understand that the car would not go around the curve without the brakes setting themselves?

A. Yes, sir; that the brakes set themselves and caused the car to leave the track.

By Mr. HAGERMAN:

Q. Would the wheels slide?

A. That was the appearance; that they would not revolve, and therefore——

Q. And that was independent of any attempt by the gripman to set the brakes?

A. Yes, sir.

Q. But just the motion of going around a curve or going up grade would tend to bind the shoe against the wheel?

A. That is the way it appeared.

Q. Well, now, why was it that you were following the cars at different times to observe their workings?

125 A. I felt a very great anxiety and responsibility about the cars, because, as it was reported to me if these brakes were adjusted to a point where they would not bind in this way, they would not have any effect on the car; they could not stop the car; and that meant very plainly to me that if the grip broke or the cable broke at any point on the grade the car would be sent to the bottom of the incline or of any grade it happened to be on, and probably cause the loss of life and damage.

Q. Well, going down the grade, you could not hold the car regardless of the breaking of the rope, without free working of the brakes and proper working?

A. Certainly not; but it was the prime condition of a car on that line that it should be held anywhere; otherwise it would not be safe to operate the road.

Q. Well, now, what effort, during the month that those cars were there and these people were repairing them, did you make as to using the cars if you could possibly do so from the practical standpoint of operating this road?

A. We made every effort that was possible to get all of the cars necessary to equip the line.

Q. What reliance did you place upon Mr. Twyman and his mechanic and their assurances as to fixing these cars so that you could operate them?

Objected to as incompetent, irrelevant, and immaterial.

By Mr. PRATT: I suppose that comes under the same general objection.

By Mr. RUNNELLS: Well, I think there is another objection to that. I don't think that, even if the general line of testimony were competent, it would be at all material to show what reliance

126 they put upon Mr. Twyman. It is either their duty, having accepted, upon our theory, these cars, to put them in repair, and, if there was anything necessary to be done within reasonable limits, to charge that to us; or it was their duty to have returned the cars.

By Mr. PRATT: It all bears on the question whether we rescinded within a reasonable time.

Objection overruled. Counsel for plaintiff excepts.

A. I supposed the cars would be fixed by him satisfactorily. He was presumed to be entirely competent to take charge of such work.

Q. Why did you suppose so?

A. Because he was the representative of the company in charge of such matters.

Q. Well, was he here for the purpose of doing that thing?

A. It was his purpose; that is what the letter from Mr. Brown, I think, stated to me, that he was come for. I think there was a letter of that kind.

Q. Well, now, when these cars were taken off and you offered to return them, what delay, if any, was occasioned or what was done as to getting other cars to put in service there?

A. You mean how long it was before other cars——

A. Yes; whether you had to order cars from a manufacturer or not.

A. We had to order cars from a manufacturer. Those were delivered, the first, I think, in about sixty days, and then up to about four months.

127 Cross-examination.

By Mr. Runnells:

Q. Have you been president of this company from its inception, Mr. Morse?

A. Yes, sir.

Q. How much mileage has the company?

A. Including horse-car lines?

Q. No, sir; cable lines.

A. It is has now about twelve miles of double track.

Q. How much had you in contemplation or how much did you propose to open or did you as a matter of fact open on or about the first of April?

A. A very small distance—about four miles.

Q. What is the gauge of your road?

A. It is standard gauge, what is generally called standard gauge—4′ 8½″.

Q. Double track?

A. Yes, sir.

Q. How far apart were the tracks—I mean the two double tracks?

A. I couldn't tell from memory. The record, of course, will show.

Q. Now, you said in direct examination, Mr. Morse, that you presumed Mr. Pullman knew about your road and its grades. You didn't mean to state, of course, as a matter of fact that you knew that Mr. Pullman knew about those things?

A. I didn't know it; no.

Q. Now, referring to the matter of seats, longitudinal and cross seats, I understood you to say that the seats should be cross-seats provided the width of the car would permit them to be put
128 in, and I think I also stated if it was found to give the seating capacity which seats in the other direction would. I think that also was a point. The width of the car, though, perhaps determined it mostly.

Q. Which would be the most expensive, longitudinal or cross seats?

A. I should say that the cross-seats would probably be more expensive.

Q. Now do you mean to say, Mr. Morse, that it was your understanding, without any change of the agreed price of $2,000, cross-seats or longitudinal seats should be put in if the width of the car or seating capacity would justify?

A. That was my understanding.

Q. And that the contract was made, admit-edly costing a good deal more or considerably more in one case than the other for the construction of the car, for the same price without reference to whether the seats were to be longitudinal or cross seats?

A. That was my understanding.

Q. Your line, as a matter of fact, was not completed until about the first of April?

A. Yes, sir; about the first of April.

Q. And at that time you had all of the cars which the Pullman Company had contracted to deliver to you, had you?

A. Yes, sir.

Q. From whom did the first complaint come about those cars?

A. From Mr. Lawless to me—the superintendent.

Q. The complaint relating to the operation of brakes?

A. Yes, sir. Will you allow me say there——

Q. Certainly.

A. That I did hear of a complaint in regard to getting the
129 first cars into the house on account of the wheels striking the car body. I couldn't say how I heard that, but I did hear at the time. That was before they had been tried on the road.

Q. That trouble was by the wheel binding on the bin going around that sharp curve?

A. Yes, sir.

Q. But that was very speedily removed?

A. Yes, sir.

Q. Then the complaint was that the brakes wouldn't operate?

A. Yes, sir.

Q. You had at the same time these cars were delivered or at the time they began to be in use a car or cars manufactured by another company, had you not?

A. Yes, sir.

Q. The La Clede Company of St. Louis?

A. Yes, sir.

Q. Did that car operate well in respect to the brakes?

A. Yes, sir; perfectly.

Q. The La Clede brake, then, if applied to these cars would have obviated the objection to them, would it?

A. I don't know whether they would or not.

Q. Well, it might safely be assumed that if that brake did work well as a matter of fact on those cars it would have worked well on these cars, would it not?

A. I can only say that they worked well on the La Clede cars.

Q. Were the La Clede cars of the same size, width, and length?

A. The same dimensions, I think, in all respects.

Q. You determined, Mr. Morse, did you not, or the company did, the dimensions of the car wanted?

A. Yes, sir.

130 Q. The length and width and everything of that sort?

A. I think that was done in some connection with Mr. Pullman.

Q. Yes; but you had the final determination of that matter, did you not?

A. Yes, sir.

Q. Now, in your *April* of April 11th you say, Mr. Morse: "If you will send a practical man here to take charge of these necessary changes it will be the best plan; otherwise we shall be obliged to make them and charge you with the expense." I will ask you now whether or not you did attempt to make any changes.

A. No changes were attempted more than the ordinary adjustments which every one makes in——

Q. Your line was in operation during the month of April and up to May 11th?

A. It was in partial operation; it was never in full operation at any time during that time.

Q. Well, you were using from 15 to 22 of those cars during a good portion of this time, did you not?

A. We ran up to perhaps 22; yes, sir.

Q. And in the operation of twenty-two cars you used variously all of the 25 cars which were furnished you, did you not?

A. I presume so; I couldn't state that fact from my personal knowledge, but I presume we did.

Q. On May 11th you discontinued their use?

A. Yes, sir.

Q. Have you had any experience in the operation of cable roads other than the Metropolitan road?

A. No, sir.

Q. You have had some observation of the operation of cable

131 roads, have you not?

A. Yes, sir.

Q. Has it not been your observation in the outset that cable roads always suffer a great deal of annoyance from the breaking of the cable and defects in the cars incident to the opening of a new line?

A. That has not been the experience of our lines, of the Metropolitan line, nor of the Grand Avenue Company, of which I was a director at one time.

Q. I mean outside of the line with which you happen to be connected.

A. I only know of the other railroad here in the city, the 9th-street line; they had some trouble.

Q. Is it not true, Mr. Morse, that the opening of a cable line is always attended with a great deal of difficulty in the way of breaking cables and the failure of the cars to operate?

A. No; I don't think that is always the case; that is not our experience.

Q. Now, on the 11th of May you discontinued the use of these cars built by the Pullman Company?

A. Yes, sir.

Q. After this discontinuance of the use of those cars you used, did you not, until some time the next day, when you stopped the operation of the road, two other cars only, the Laclede cars? You ran these for a day, did you not?

A. I couldn't tell that.

Q. Well, now, isn't it a matter of fact that you did operate the line, after you took these cars off, for a day; that you operated only two cars, and that your cable broke with the operation of those two cars?

132 A. I couldn't state that, excepting that I know the cable did break within a day or two, but I don't remember, or just the difficulty.

Q. You were not closely enough connected with the operation of the road to know that?

A. No, sir; I don't remember that in detail.

Q. While these cars were in operation, Mr. Morse, of course you collected fares for their use?

A. Yes, sir.

Q. And those you have retained?

A. Yes, sir.

Q. Did you make any effort to apply the Laclede brake to the Pullman car at any time?

A. No, sir. We made no effort to apply any different from what they had.

Q. Have you still continued to use the Laclede cars?

A. We used them until some time last autumn, and then, as they were odd cars, we put them in the house.

Q. And you haven't used them since last fall?

A. No, sir.

Q. How many of them were there?

A. Four of them.

Q. Were they combination cars?

A. Yes, sir.

Q. I should like to ask you whether or not, as a matter of observation, the combination cars are suitable in the operation of such a line of cable road as you have, in your judgment.

A. I think there is no reason why it should not operate well there. I rode every day last winter on the road of the Grand

133 Company, and the manager and president of that company claims that the north end of his line is the most difficult piece of cable line in the city to operate. All the cars of the 15th and Grand avenue lines pass around that loop in the north end of the city, and that the cable wears a shorter time than any other; but they get a service of from four to five or six months out of that cable, and have on it from—well, there are some 30 to 40 cars on the line. They are quite large, the combination cars, and I should assume from that if they could operate those cars we could operate ours.

Q. Are their grades as severe as yours?

A. Their grades are not as severe, but they have sharper curves and a great many more curves than we should ordinarily have on the 12th street—nearly double.

Q. You are using the combination cars on your road today?

A. No, sir; that is on the Grand-avenue line.

Q. But when you made a new order for cars, you made an order for the other kind of cars?

A. Yes, sir.

Q. Why did you do that?

A. Because, in the first place, we get them in half the time. Combination cars are more difficult to construct, and it was an essential thing for us to equip the line as soon as possible.

Q. And in the second place?

A. And in the second place, we were a little discouraged with the operation of the cars from the Pullman Company, and we did not know what other trouble might arise.

Q. You had the Laclede Company's cars, and if they worked all right, why did you order more of them?

Q. Well, if we had been able to get them in the same time
134 we would probably have equipped the line in the same way.

Q. Is it or is it not your judgment that those cars were too heavy for your line?

A. Well, they were a heavy car and I think lighter equipment is always best, but they were not too heavy to be practical.

Q. Then that was not a direct answer to my question, whether they were too heavy, in your judgment?

A. I don't know that I should say they were too heavy, but they were too heavy to be practical.

Q. Would not a *little* car be better for that line?

A. I say, in answer to that, that the lightest car is always the best if it is strong enough.

Q. Would not a lighter car have been better for your line?

A. I think it would.

Q. Didn't your superintendent, Mr. Lawless, object to the adoption of the plan of the combination cars and insist that a lighter car would have been better?

A. I don't think that he ever made any objections to me in regard to it.

Q. Not having been made to you personally, of course you could not testify to that?

A. No, sir.

Q. Have you sold or disposed of the Laclede cars you bought, or are they simply stored?

A. They are simply stored.

Q. Has the 9th-street line owned by your company ever used a combination car?

A. You don't mean the 9th-street line; we don't own that.

Q. Well, the 9th-street cable company don't use a combination car, does it?

135 A. Well, no, sir; they have never used any, to my knowledge.

Q. There line is somewhat similar to yours as to grades, is it not?

—. ——.

Q. When the 9th-street line was opened did they have a great deal of trouble about the breaking of cables?

A. They had a great deal of trouble, mainly caused from bad construction.

Q. You have a line running over 18th street, have you, Mr. Morse?

A. Yes, sir.

Q. That has not severe curvatures or heavy grades, has it?

A. No especially severe curvatures.

Q. And why have not you used the Laclede Company's cars on that line?

A. We should have equipped the line with combination cars, but the city refused to give us the right to turn here at the junction, the northern terminus of the road. We made a strong effort to obtain that right, and *and* the city engineer and counsel refused to allow us to put in a turn-table there. It was the intention to use that class of cars.

Q. Mr. Morse, have you ever made any effort to put these cars in condition for use other than you have stated?

A. The Pullman cars?

Q. Yes, sir.

A. No, sir.

Q. Those efforts were all made by the Pullman Company as the result of correspondence with the company from you, were they not?—that is, in other words, you never did anything and never expended any money to put these cars in condition to use?

A. No, sir.

Q. The superintendent of operation was Mr. Lawless, was he not?

136 A. Yes, sir.

Q. And what officers were there under him—I mean operating officers?

A. He had a division superintendent as the immediate subordinate under him.

Q. More than one?

A. Not on that line.

Q. Have you more than one power-house?

A. Yes, sir.

Q. Two?

A. We have three.

Q. On the 12th-street line you have *n*ut one?

A. But one on the 12th-street line.

Q. Who was in charge of that in June, 1888?

A. I couldn't give his name; I don't know.

Q. Was it Mr. Barnes?

A. Mr. Barnes was division superintendent; I thought you meant who was in immediate charge of the power-house.

Q. You don't know the name of the man who was in charge of the power-house?

A. No, sir.

Q. Is the same man there still?

A. Mr. Barnes is there still.

Q. Is the same one in charge of the power-house?

A. That I don't know.

Redirect examination.

By Mr. HAGERMAN:

Q. These Laclede cars, you say, worked all right?

137 A. Yes, sir.

Q. You didn't have any troubles with the wheels binding in going around curves?

A. No, sir; not a bit.

Q. Or in going up grade?

A. No, sir.

Q. The Laclede cars were furnished under the same specification?

A. Yes, sir.

Objected to as incompetent, irrelevant, and immaterial.

Q. Did they have cross-seats?

A. Yes, sir.

Q. Did the Laclede cars come furnished with cross-seats at the same price, $2,000?

A. Yes, sir.

Counsel for plaintiff objects and moves to strike out the question and answer as incompetent, irrelevant, and immaterial.

By the COURT: It may bear upon the question of credibility, and therefore the motion will be overruled.

Q. Col. Morse, Mr. Runnells asked you whether you ever did anything towards fixing these cars. I call your attention again to your letter of April 11th and ask you whether the Pullmans ever turned the matter over to you to permit you to do the fixing, or whether they attempted to remedy the defects themselves?

A. They sent their authorized man to take charge of the repairs; they were never turned over to us to make or to be made.

By the COURT:

Q. Nothing was said about your doing it?

138 A. Nothing was said about our doing it.

Q. You were also asked whether you collected the fares during this month you were attempting to use these cars. I will ask you whether the road at that time paid expenses?

Objected to as immaterial.

By Mr. PRATT: It would not have been material if they had not asked that question.

Objection sustained. Defendant excepts.

Counsel for defendant states that they expect to show by Col. Morse in this connection that at that time the road did not pay the actual expense of operating it by reason of the fact of these brakes working as they did. There were frequent brake-downs and they could not get the fair use of the road; that immediately after they got on a proper equipment the road did pay and has ever since paid expenses and more.

Counsel for plaintiff objects and submits that it is not proper, when an objection has been made to testimony and sustained by the court, to make an argument on the matter of the evidence that your honors have sustained an objection to.

By Counsel for Defendant: It is our purpose merely to put upon record what it was expected to prove, and that, I understand, is what is required of us.

By the Court: We think the testimony is incompetent.

Defendant excepts.

Q. The Ninth-street cable, about which you were asked, had some trouble at the time it was opened; that was the first cable they ever had in Kansas City, wasn't it?

A. Yes, sir.

Q. Did you ever authorize any one, after your offer to return
139 these cars to the Pullman Company, to say that they were for sale or would be sold?

A. No, sir.

Q. Did any man out at your power-house, in charge there, have any such authority?

A. No, sir.

By Mr. Runnells:

Q. There was no objection made by the Pullman Company to your repairing these cars *on* putting them in a condition to use, was there?

A. The question never came up. I don't know whether there was any objection or not.

Q. You want to be understood as saying that you made no effort yourself to put them in condition?

A. Yes, sir.

By Mr. Hagerman:

Q. One further question: Did you ever know or hear of anybody claim that anybody out there at the power-house had ever offered these cars for sale before you heard some one testify here yesterday?

By Mr. Runnells: As far as his knowledge goes, we have no objections, but as far as hearing is concerned, we object to it as incompetent, irrelevant, and immaterial.

Q. Did you ever know of the cars being offered for sale?

A. No, sir.

Q. Did you ever hear of any one at the power-house saying that

they were for sale before you heard the testimony yesterday afternoon?

139½ Objected to as incompetent, irrelevant, and immaterial.

By the COURT: We don't see the particular difference between the two questions.

By Mr. RUNNELLS: I can see a pretty wide difference between actual knowledge and hearsay. Mr. Morse might not have had brought to his knowledge the fact that the cars were offered for sale. That, I submit, would be proper to testify to, but it would not be proper for him to testify that he had heard that somebody had offered them for sale.

By Mr. PRATT: The gentleman objects to the question upon the ground, which I think very proper, that there is really no competent evidence here that they ever were offered for sale, but the objection we made to Mr. Rice's testimony here yesterday has not yet been ruled upon. Your honors will remember that the gentlemen on the other side said they would follow it up with proof that some party in authority did authorize them to be offered for sale.

By the COURT: We don't think it is at all material. He says he didn't authorize it.

Q. Well, you do know that nobody out there in charge of that power-house had authority to do any such thing?

A. I know that.

By Mr. RUNNELLS:

Q. You mean any one that was constantly employed there?

A. That is what I understand Mr. Hagerman's question to mean—any one at the power-house.

140 By Mr. HAGERMAN:

Q. Who were your officers at that time? You were president; Mr. Lawless, superintendent; Mr. Knight, chief engineer, and Mr. McCarty was auditor. Were those the officers that had charge of the operation of this line?

A. Yes, sir.

Q. Now, did any of those officers, or any agent of the company, or any employee of the company have any authority whatsoever to make an offer of sale of those cars?

A. No one had any authority whatever.

By Mr. RUNNELLS: In order to get my objection fully in form that I made to the interrogatories with respect to the Laclede cars, where I objected to the answer as to the price; there were two or three questions preceding that which were of the same character and related to the same subject—that is, as to the specifications generally, that they were of the same size and dimensions or something of that sort. I want my motion to strike to include all of the inquiry upon this subject, upon the ground that the specifications themselves are the best evidence.

By Mr. HAGERMAN: Upon the ground of incompetency we have

no objection to your objections applying to what you want; but upon the question of secondary evidence, you consulted about that and did not make it at that time.

By the COURT: We don't remember that the objection that the specifications were the best evidence was made at that time.

Plaintiff except-.

(Witness excused.)

141 WILLIAM B. KNIGHT, called on the part of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. HAGERMAN:

Q. What connection had you with the Metropolitan Street Railway Company at and before the negotiations for the Twelfth-street line cars from the Pullman Company began up to and after all the cars were delivered?

A. I was engineer in special charge of the work—the construction of that line.

Q. There are some letters here signed by Knight & Bontecou as chief engineers. You were chief engineers?

A. Knight & Bontecou were the chief engineers by appointment, but I was the specially detailed engineer in charge of this work.

Q. That is what I want to get at. Mr. Bontecou took no part? You had special charge on behalf of your firm of everything connected with that particular work, connected with the department of your firm?

A. Yes, sir.

Q. A letter has been offered in evidence here from your firm to Mr. C. L. Pullman, telling him you were ready to talk cars for the Twelfth-street line, which was written some time in May, 1887. Now, in response to that letter, what took place as to Mr. Pullman's coming here and what was done?

A. Mr. Pullman came here, I think, shortly after that, and bids were received from him and from the Laclede Car Company for furnishing the Twelfth-street line with twenty-five combination cars.

142 Q. Well, now, at the time that Mr. —— or before the written proposal, which was made afterwards and was accepted, came from Chicago and was sent back, what took place between you and Mr. Pullman and Col. Morse as to what kind of cars they were to furnish and as to whether the seats were to be cross-seats or longitudinal seats? State in substance what was said between you. As I understand, Mr. Knight, after Mr. Pullman had been here and made his bid he went back to Chicago and subsequently the proposition came which was accepted by you, as shown by the correspondence?

A. Yes; well, he had, as a matter of fact, at the time of making the proposal here an acceptance, and he prepared the specifications, which was afterwards embodied in the contract which was made.

Q. Well, at that time, while Mr. Pullman was —, what was said

as to furnishing cars for the Twelfth-street line and as to cross-seats, if anything?

A. We had various consultations with Mr. Pullman, myself and Mr. Pullman and Col. Morse, and in one case I think with Mr. Lawless also, in reference to details, arrangements, and dimensions of cars; and the question of cross-seats and longitudinal seats, dimensions, and relative seating capacity of the cars in that connection was brought up, and I favored very much the cross-seats, and it was clearly understood to my mind that the seats in the cars were to be cross-seats.

Q. Well, what was said, if anything, as to the cost of $2,000, including the cars with the cross-seats?

A. There was nothing specific said as to that, further than appears in the specifications. The absence of any special mention of the cross-seats did not strike me as important at the time. The specification as to seats referred, as I understood it, as to the finish of the seat, whether it was to be cane or plush or wood, or the style and finish of the seats rather than the method of their construction.

143 Q. That part of the specifications which referred to seats same as 16-ft. cars recently built?

A. Yes, sir; referred simply, as I understood it, to the finish and style of the seat.

Counsel for plaintiff moves to strike out the testimony as to the meaning of that clause of the specifications as incompetent, irrelevant, and immaterial, the same not being ambiguous matter requiring explanation by parol.

By Judge PHILLIPS: I don't think you understand the witness. He states the conversation had with Mr. Pullman, or his understanding of it, and then assigns that as the reason for letting the specifications go in the form it was, because he didn't understand that it referred to the mode of construction of the seats. It simply bears upon the credibility of his testimony. He don't undertake to say what the legal effect of the contract was, but gives his understanding as an explanation of why he let it go in that form.

Objection overruled. Plaintiff excepts.

Q. Now, this talk with Mr. Pullman was prior to the time that you received the written proposition from Brown, as shown by the correspondence here?

A. Yes, sir.

Q. Now, I believe the date of your acceptance, Mr. Knight, is June 27th. Upon that same day your acceptance was made here in Kansas City?

A. Yes, sir.

Q. Now, upon that same day, Mr. Brown, in Chicago, wrote you a letter in which he says: "Our mechanical department has been looking into the practicability of putting cross-seats in the
144 closed portion of the cable cars we are building for your company." Now, what I want to ask you is, between the

time that Mr. Pullman had been here and the time this letter was received by you, had the subject of cross-seats been up?

A. No, sir; I think not.

Q. What was the occasion of your writing the letter in May, telling Mr. Pullman that you were ready to talk cars on the Twelfth-street line?

A. Why, it was simply in conformity with a promise I had made him to let him know when we were ready to receive proposals for the equipment of that line.

Q. He had been here previous to that?

A. Yes, sir.

Q. And knew that your Twelfth-street line was in process of construction?

A. Yes, sir.

Q. And you had promised him to let him know when you would be ready for bids on cars?

A. Yes, sir.

Q. What, if anything, in your verbal conversations with Mr. Pullman, was said as to him furnishing cars in all respects satisfactory to the Twelfth-street line?

Objected to as leading and incompetent. Let the witness state what was said and done.

By Mr. HAGERMAN: It is material upon the question of whether Mr. Pullman knew he was furnishing these cars for this specific line—the Twelfth-street line.

By the COURT: The question is too general. Objection sustained. Defendant excepts.

Q. Mr. Knight, attached to these specifications are the
145 words: "Plans to be sent for approval Met. Co's engineer." You may state who wrote that upon the specifications.

A. That is my writing; yes, sir.

Q. Well, now, when was it that you wrote that, when the proposal was received and before you returned it as accepted?

A. Yes, sir; this was written on the proposal that was submitted by Mr. Pullman at the same time that Mr. Sutton submitted the proposal of the Laclede Company. The two bids were taken and canvassed, and Mr Pullman's bid was accepted for the twenty-five cars; and I was desirous of seeing the general plans and the arrangement of seats and the height of the car and the general features of it, and Mr. Pullman promised to send them to me, and I wrote that on there as a memorandum.

Q. You wrote that on there as part of the specifications before you sent the contract back accepted?

A. Yes, sir.

Q. And when the contract was sent back accepted it was with that written on the specifications?

A. No, sir; I think not.

Q. When was it that you finally received the plans?

A. I never received a complete set of plans. I had general plans,

floor plans, and a side-view plan, and possibly one or two other plans that came along at intervals during the next five or six months, possibly, or during the next season; and I examined, in addition to that——

Q. Now, there was a letter here of July 13th from Mr. Brown to your firm, speaking, among other things, of cross-seats. I want to know whether that came in the mail or was delivered personally to you by some one?

146 A. I think that was a letter that Mr. Twyman brought down with him when he came here. I can tell by my acknowledgement of it. Yes, sir; it is.

Q. Well, now, Mr. Twyman came here with that letter?

A. Yes, sir.

Q. What was the purpose of his visit, and what was done while he was here?

A. The general purpose of his visit, as he explained to me, was to decide upon the general features of the car. In the first place, to determine what was the shortest curve and other physical conditions of the road; to determine the radius of the shortest curve it would have to go round and other physical conditions of the road it was to be operated upon, and to arrange with reference to the outside width and the extreme lengths over all, the relative position of the two trucks and the height of the wheels and the height of the steps and the height of the seats and the distance between the seats, and the elevation or height of the window-sill, and general matters of that kind. He was in my office for some time going over those matters.

Q. Well, now, did you have the plans and profiles in your office at that time showing the curves upon this road and the grades, as the road was finally put in operation?

A. That was in what month, Mr. Hagerman—in July?

Q. Yes; in July.

A. Yes, sir; they were all in shape.

Q. What examination, if any, did Mr. Twyman make at that time?

A. Why, he was in my office there for several days—I don't remember just how long—making general drawings and discussing with me and with my assistants the general features of the

147 car and the characteristics of the road.

Q. Examining those plans?

A. Well, what plans do you refer to?

Q. That were in your office, showing the curves and grades, &c.

A. He has access to all the information that he desired.

By Mr. RUNNELLS: That don't quite answer the question.

Q. No: I want to know whether he was in there examining those things.

A. I suppose he did. I didn't actually see him examine the profile, for instance, but he certainly knew what the shortest curve was.

Q. Well, was he here inquiring about it?

A. Yes, sir.

Q. Did you tell him where he could find them?

A. They were right in the office there before him.

Q. Well, now, at that time, what, if anything, was said as to some additional specifications?

A. Well, we determined upon some general—some features of the specifications which were not mentioned in the general contract and specifications.

Q. Those were put in writing?

A. Yes, sir.

Q. Well, now, Mr. Knight, you forwarded the original to me, but I have mislaid it for the present; but I have here attached to a letter of yours to Col. Morse, dated May 21, 1888, what purports to be a copy, and as you are going away and I won't be able to find the original in time, I will ask you to look at this and say whether that is a copy of those specifications.

A. Yes, sir; this is a copy of the dimensions and other points that were determined upon by Mr. Twyman when he was here and myself in consultation.

148 Q. Well, now, what, if anything, is said there as to seats?

A. Sixteen cross-seats to be fixed as decided.

Q. Why were you not able to complete that specification at that time?

A. Mr. Twyman was not able to determine at that time just how low he could make the window-sill or just what the height of the seat would be above the floor or what would be the exact distance between the seats or how wide the seats would be, and those details were to be worked out by him when he returned to Chicago, and decided upon subsequently.

Q. Well, what I want to know, Mr. Knight, is generally at the time these specifications were made what were you and Mr. Twyman attempting to do, to make new specifications or to make more specific in some respects wherein the former were indefinite?

A. To make the specifications more definite.

Q. This correspondence discloses, Mr. Knight, that some time about the 10th of August, you were in Chicago—the 10th of August, 1887. Now, I will ask you whether or not you went there at that time for the purpose of looking at a car that had been built for some St. Louis company?

A. I went there some time in the summer—I don't remember the date—to examine the cars that were made for the Citizens' Railway Company, under which they proposed to use the same split-bolster trucks which we designed and contemplated for the Twelfth-street line.

Q. How far toward completion had these cars gone at that time, or any of them, that they were constructing for you?

A. Well, I think they were in rather a primitive state; I don't remember exactly now. I did, however, make a report to Col. Morse, our president, of the cars, while my memory was fresher,

stating in what condition I found the cars on the occasion of
149 both of my visits to Pullman.

Q. Was there anything that you could see there that would in anywise indicate how the brakes upon the cars worked on curves?

A. No, sir; there was no brakes upon any of the cars that I saw on any of my visits to Pullman—that is, upon any of our cars.

Q. I find these specifications provide: "Brakes to be operated by gripman with lever, both trucks." What is the meaning of that language?

A. That means that one lever operating in front of the car is to set the brakes on both trucks—the forward truck and the rear truck.

Q. That is to say, when the gripman was standing there operating the lever by the side of the grip lever, when he threw the brake that would operate upon all the wheels of the car, without the assistance of any man in the rear using a brake there?

A. Yes, sir.

Q. I notice here as to brake power it is left blank. Now, I want to ask you whether or not you relied upon the skill and judgment of the Pullman Company as to making these brakes.

Objected to as incompetent, irrelevant, and immaterial. It is very evident from the relations of these parties that the Metropolitan Company had the right to order just such brakes as they saw fit. That is shown by the testimony of Mr. Morse, that they were to have such cars as they directed.

By the COURT: You may ask whether any instructions were given as to the form of brakes.

Q. I will ask you, Mr. Knight, then, whether any orders as to brakes and the kind that were to be put on were ever given by you to the Pullman Company.

A. No, sir; I never gave a specific order as to the kind
150 of brake to be used, except the specifications provided the brake-shoe should be of a certain kind. The general arrangements of the brakes and all details were left to the Pullman Company.

Q. Now, Mr. Night, there is a telegram here of March 3rd, 1888, from you to Mr. Brown, in which you telegraph him that the cars would not go around a curve of 30-ft. radius. I will ask you to explain how that telegram came to be sent and what it referred to.

A. We were at that time or had been getting our cars into the power station at 12th street and Charlotte.

Q. That was prior to the opening of the road?

A. Yes, sir.

Q. Or prior to the time when you had any power there so that you could run the car over the line?

A. I don't know whether we had the power there at that time or not, but at any rate we had not operated any power upon the line, but had just received these cars from the Pullman Company and were taking them into the car-house, and in going into the house

from the main track it was necessary to pass around the curve of 30-ft. radius, which they wouldn't do without interference of the upper part of the wheels with the lower part of the framework of the car.

Q. The brakes were not at all set or used in going around there; they didn't use the brakes in any way?

A. No, sir; it was merely a matter of interference between the trucks and the sides of the car.

Q. It hadn't any connection with the brakes or their use?

A. No, sir.

Q. But when those cars were hauled up from the freight depot to the power-house and you undertook to run them into the
151 power-house, then you found that the wheels came against the body of the car?

A. Sill of the car; yes, sir.

Q. Sill of the car; and that is what that telegram was about?

A. Yes, sir.

Q. You had nothing to do, I believe, with the operation of the road?

A. No, sir.

Q. Your connection with the matter ceased at the time of that telegram, after the cars came here?

A. Yes, sir.

Q. There is one question, Mr. Knight, which probably I ought to ask to make your testimony a little better understood. Referring again to the specifications—"seats and backs same as 16-ft. cars recently built;" had they built some cars for you on the 5th-street line?

A. Yes, sir.

Q. How were those seats fixed?

A. You mean as to finish or as to——

Q. As to finish.

A. I don't remember exactly now as to how they were finished.

By Mr. PRATT:

Q. You don't remember, then, what that had reference to?

A. It referred to the character of the finish, as I understood at the time, but I don't remember what that finish was.

Cross-examination.

By Mr. RUNNELLS:

Q. Mr. Knight, you say you went to Chicago in August and the construction of the cars had already been begun by the Pull-
152 man Company. Had it?

A. Yes, sir.

Q. And some progress had been made in that?

A. Yes, sir; just what I don't remember.

Q. You discussed generally the construction of the cars with the men in charge of the work, did you?

A. I examined the construction of them; yes, sir.

Q. Now, you say you never gave any specific order with respect to the kind of brakes to be used; what did you mean by that, that you had never given any order about them?

A. No, sir; I didn't mean exactly that; I had made a request, or you might call it an order, that the brakes should be made extra heavy, and I think extra powerful, and I examined on the occasion of one of my visits to Chicago and Pullman a plan which Mr. Twyman had for the brake-lever, showing the arrangement of the brake-lever on the car, and expressed the opinion that it was not powerful enough, and he agreed with me that it could be improved. He said he would do so, but I never saw any plan or knew definitely what was done or how fully my suggestion was carried out.

Q. Now, it is true as a general proposition, is it not, that the nearer the brake-shoe set to the wheel or is placed to the wheel, the less lost power or loss of motion there is in the application of the brake?

A. Yes, sir.

Q. So that you would say, as a general rule, that the nearer the brake-shoe could be set to the wheel not to interfere with its operation, the better?

A. Yes, sir.

153 Q. Now, the original specifications provided for a car 6 feet 6 inches or more over the sills. The amendment that was made to that, or more definite statement of the dimensions as they were subsequently agreed upon, provides that the width shall be 8 ft. 3 in. over all and the width of the floor frame 7 ft. 3 in. Now, that provides for an increased width of the car of a foot and nine inches?

A. I don't think it is as much as that. No, sir; the width over the sill and the width over all are two different things.

Q. To make it a little plainer, the first provides that the width shall be 6 ft. 6 in. over the sills?

A. Yes; that is the floor width.

Q. The amended specifications or more minute specifications provide that the width of the floor frames shall be 7 ft. 3 in.?

A. Over the sills; yes, sir.

Q. There was that increase in width?

A. Yes, sir.

Q. Now, that was done upon your order and request, was it not, Mr. Knight?

A. It was done in consultation with Mr. Twyman. We decided upon that as the necessary dimensions in connection with the other details of the car.

Q. But that increase in the dimensions was determined by you, was it not?

A. Not entirely.

Q. You had the power to determine whether the car should be 6 ft. 6 in. or 7 ft. 3 in.?

A. Subject, of course, to such practical requirements as Mr. Twyman should insist upon.

Q. But you were having the cars built and determined what they should be—you were making the order?

A. Yes, sir.

154 Q. So it was in your power to determine whether it should be 6 ft. 6 in. or 7 ft. 3 in.?

A. I suppose I could have done that, but we worked to that width from other dimensions.

Q. Now, why was that increased width made?

A. I suppose it resulted from the requirements of seats of certain width and an aisle of a certain width or clearance or accom-odation in the car.

Q. Wasn't that increased width from the fact that you had decided to have cross-seats instead of longitudinal seats?

A. We always intended to have cross-seats.

Q. Then why in the original contract was it left undetermined?

A. It was an omission on my part not to have stated that specifically, but, from conversations had with Mr. Pullman, I supposed there was no question about cross-seats being a feature of the car. We never had, at least I never had, contemplated anything else and never had talked anything else, and Mr. Pullman himself had suggested the cross-seats in conformity with some plans he had previously submitted for some cars on the Grand Avenue Company's line.

Q. Isn't it true, Mr. Knight, that you as engineer of that company were in favor of cross-seats, while Mr. Lawless, your superintendent, was in favor of longitudinal seats, and that that question was not decided then; but you finally decided, controlling the matter, that you would have cross-seats, and that that increased the width of the car?

A. No, sir; I did not determine that myself. I always favored the cross-seats, and I understood Mr. Pullman to favor them, and the matter was discussed with Mr. Morse and with Mr. Lawless; still I think Mr. Lawless favored the longitudinal seats.

Q. Isn't it a little singular, if both parties favored cross-seats,

155 you should in the specification provide that the seats should be the same as in the 16-ft. cars, which were longitudinal seats?

A. It was an omission and nothing more, as I understood it.

Q. Would a floor dimension of 6 ft. 6 in. permit the use of cross-seats—mechanically, I mean, Mr. Knight?

A. It would not of the proper width of cross-seats, I don't think.

By Mr. HAGERMAN:

Q. One word, Mr. Knight. This talk that you had, as you stated, about the brake-lever, that didn't refer to the brakes at all? The brake-lever is one thing and the operation of the brakes is another.

By Mr. RUNNELLS: There is no misunderstanding about that at all. He means that the handle of the brake was not of sufficient strength. There is no difference of opinion about that.

By Mr. HAGERMAN: Well, that is all right.

(Witness excused.)

EDWARD J. LAWLESS, called on the part of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. HAGERMAN:

Q. What connection had you with the Metropolitan Company during the construction of the 12th-street line and during the negotiation for the building and the attempted use of these Pullman cars?

A. Superintendent.

156 Q. Do you remember of Mr. Pullman being here before the order was given for the cars—Mr. Charles L. Pullman?

A. Yes, sir.

Q. What about Mr. Twyman being here in July, 1887?

A. I don't know much about Mr. Twyman being here in July, 1887.

Q. Do you remember whether he was here at all?

A. Yes, sir; I remember he was here; but I didn't have much conversation with him at all.

Q. His business at that time was with Mr. Knight?

A. With Mr. Knight; yes, sir.

Q. Now, something has been said, Mr. Lawless, about your being present in Chicago in the latter part of December, 1887, inspecting some cars that were finished or partly finished. Will you state the number of cars that were there at that time?

A. They had ten cars that they claimed to be pretty near ready for shipment, and they had five cars, I think it was, that had been in the same state, but they were cutting them up. Those they were cutting out the side panels.

Q. Well, how near completion was these ten cars?

A. Well, they were, you might say, completed.

Q. Well, what remained to be done on them?

A. Well, when I examined them, the position of the brake-lever was not satisfactory and the draw-bar that they had at the back end of the car was wrong and they had no grip-gongs, and the fenders—the guards—were not on them. They had them, I believe, though, somewhere in the building.

Q. But they had not been put on the cars yet?

A. No, sir.

Q. What I am getting at is, whether the cars were then ready and complete for delivery.

A. Right then, at the time I was there?

157 Q. Yes, sir; at the time you were there.

A. No, sir; they were not.

Q. Well, now what was done or said as to an inspection of the cars?

A. Well, I went all over them. I told them that they would require grip-gongs. I told them that there should be a grip-box somewhere convenient to the gripman. I called attention to the coupling which they had on the back of the car. It would do for hauling the car, but certainly wouldn't do for pushing the car; that the purpose of that was, that when a car broke down the car behind

was to push it up out of the way, whereas with the coupling they had on there we would have had to send for the car ahead to come back and take her up, which we couldn't very well do.

Q. Well, what else?

A. And the brake-lever—I claim that it was too far away from the gripman to be handled quickly.

Q. Well, *now*, there doesn't seem to be much difference about what was the trouble; but I will ask you, Mr. Lawless, whether the trouble with the brake-lever was that when the gripman was standing at the grip-lever he was not within the reach of the brake-lever.

A. No, sir; he was not.

Q. So if while he was at the grip-lever he wanted to reach the brake-lever he would have to make a step forward?

A. Yes; he would have to make, I think, two steps forward.

Q. And that was called to their attention?

A. Yes, sir.

Q. Well, what was the result?

A. I wanted the quadrant and the lever moved back, and one of the men there—I think it was the master mechanic, or they got some man there to examine if that could be done, and he claimed it couldn't be moved back on account of the beam of the
158 forward truck being in the way.

Q. Well, then, what was finally done?

A. I told them that it would have to come back; that we couldn't have it that way, and at the time it didn't seem to be known how it could be done, but whether I suggested the bending of the lever or they did I don't remember, but it was suggested and done.

Q. The bending of the lever was to put it within reach of the gripman when he was standing at the grip-lever?

A. Yes, sir.

Q. Well, now, what about the general finish of the car?

A. Well, the general finish of the car was very attractive.

Q. Well, this changing or fixing of the brake-lever didn't have any effect upon the operation of the brakes in any way?

A. No, sir.

Q. It was just a question of getting it within easy access to the gripman?

A. Yes, sir.

Q. As a matter of convenience?

A. As a matter of convenience.

Q. Well, now, what about inspecting or examining the brake appliances to see how the brakes would work on curves or grades such as they have on the 12th-street line?

A. Couldn't tell anything about the brake working on curves until you take the car out and try it. I had a man there to pull the brake-lever, and I examined the shoes to see if they would hug the wheel, and they appeared to hug the wheel all right.

—. And that was true after the cars reached here so far as appearances were concerned?

A. They looked all right; yes, sir.

Q. But when you came to the practical application upon the

grades and curves of the 12th-street line here they wouldn't work?

159 A. No, sir.

Objected to as leading.

Q. Now, Mr. Lawless, will you please state whether you accepted those cars at Chicago or whether you went there for any such purpose; and, if so, what did you say upon the subject?

Objected to as leading and incompetent, irrelevant, and immaterial.

By the COURT: He may state what was said and done.

Q. In the first place, Mr. Lawless, for what purpose did you go there?

Objected to.

A. I went there to inspect the cars.

Objection withdrawn.

Q. For any other purpose?

A. No, sir.

Q. Now what, if anything, did you say as to the acceptance of the cars at that time?

A. I didn't say anything about accepting the cars.

Q. Was anything said upon the subject of acceptance?

A. No, sir.

Counsel for plaintiff objects and moves to strike out the question and answer as leading, incompetent, irrelevant, and immaterial.

Q. Will you give your reasons for not at that time opening the subject of acceptance?

Objected to as cross-examination, leading, incompetent, irrelevant, and immaterial. Let him state what was said and not what might have been his purposes.

By Mr. PRATT: We don't want to be misunderstood here. We want it distinctly understood by the counsel on the other side
160 and the court that we do not claim that Mr. Lawless did not go to Chicago for the purpose of inspecting those cars, but, on the contrary, we say that he did go there for that purpose; that when he got there he found ten of the cars, as testified to by Mr. Sessions, practically ready for delivery; and Mr. Lawless says they were not ready for delivery and gives what was the reason. But we do claim just what Mr. Lawless has said here—that he did not then and there accept the cars. Your honors will remember that the contract provided that they should be inspected and accepted at Chicago. Now, there is no difference at all between us but that we did inspect them at Chicago when Mr. Lawless went on—that is, as many as could be inspected—ten of them—and gave them such an inspection as was possible to be made. But we maintain that we did not accept them and never did accept them. I want your

honors to distinctly understand it before passing upon the relevancy of that evidence.

By the COURT: You may call out anything that was said, and the question of acceptance is to be determined by what was said and done at the time, and cannot be disposed of by one witness saying he did accept and another saying he did not accept. Bring out the full conversation and everything that was said and done, so that the court may be fully advised, and then, in view of all the surroundings and the exact words used by the parties, it can determine whether there was acceptance or not. His purpose for not accepting is hardly competent.

Defendant excepts.

Recess until two o'clock p. m.

161 APRIL 25TH, 1889—2 p. m.

Direct examination of Mr. LAWLESS by Mr. HAGERMAN resumed:

Q. Before you went to Chicago for this inspection had you ever seen or known what the contract was?

A. No, sir.

Q. Well, at the time you were there, did you know what the contract provided as to inspection or acceptance?

A. No, sir.

Q. What, if anything, did you say when you were there about if the rest of the cars were built as those that were then before you they could send them on and that would be all right?

A. I can't remember what was *said*, but the understanding was that the cars were to be shipped after I left.

Q. When did the first instalment of the cars come?

A. I think about the latter end of January or the beginning of February.

Q. Aren't you mistaken about that? Wasn't it the latter end of February or the beginning of March?

A. Yes, sir; it was the latter end of March that we started up, and it was the latter end of February or beginning of March that they began coming.

Q. Do you remember the trouble you had when the cars were being taken into the power-house?

A. Yes, sir.

Q. What was that trouble?

A. The truck in going around the curve interfered with the sills on the body of the car.

Q. That was afterwards removed?

A. That was afterwards removed.

Q. Now, when was it that you got the line in shape to take the cars out?

A. The latter end of March.

Q. How long before you wrote the letter of March 23rd to Mr.

Brown stating about the cars being tried and the brakes wouldn't work?

A. How long before?

Q. Yes.

A. That letter was written the day after, I think, that I tried it—the day after, I think, it was.

Q. What had you done when the east end of the line was opened at that time—or was it ready to run a car over—as to taking one of these cars out to try it?

A. Well, we took a car out to try it and found that the brakes wouldn't work—that is, they wouldn't hold the car on even the lightest grade. We found that they bound in going around the curve—that the brakes bound.

Q. In the meantime, before the road was all ready for running cars both on the east and west ends, I understood you to say that no cars were taken out?

A. No cars were taken out.

Q. Now, what response did you get to that letter of March 23rd, telling them the trouble you had with these brakes and asking them what remedy they proposed, either by letter or person?

A. I don't believe I got any reply by letter. I think Mr. Twyman came out.

Q. Did he attempt to remedy the trouble?

A. Yes, sir.

162 Q. Before he left, what, if anything, did he report as to the defects being remedied?

A. He said that the defects would be remedied; that the brake would be fixed all right.

Q. After he got through, what, if anything, did he say as to having fixed them all right?

A. I don't remember whether it was that time or on a subsequent occasion that he claimed to have fixed a car, and we took it around the east end, and when we came back he asked me if that brake was satisfactory, and I told him that in view of the trouble we had had already with the brake that I couldn't answer him until I had tried the car a little longer and had made some more trips, and then I would be able to tell him whether it was satisfactory or not.

Q. I notice in that letter of March 23rd you say, "As a perfect-working brake is an imperative matter with us, I would like to hear from you on the subject and what remedy you propose." Now, will you tell why a perfect-working brake is an imperative matter on such a line as this?

A. Well, a perfect-working brake is an imperative matter on any line, and more particularly on this line on account of the heavy grades and narrow streets and heavy travel on some of the main cross-streets.

Q. Now, at that time, while Mr. Twyman was down, what, if anything, was found the matter with this brake-lever, as they had bent it in answer to the conversation, or what took place at Chicago when you were there in December, in addition to the working of these brakes which you wrote them about?

A. About the bending of the lever?

Q. Yes.

A. Mr. Twyman, when he came down and looked at the cars and saw the change that had been made up in Chicago, stated that that brake was designed by him, and that the change had been made up there without his knowledge, and that it should not have been touched without consulting him.

Q. Was that referring to the brake-lever or to the working of the brakes themselves?

A. That was in reference to the brake-lever.

Q. On March 29th Mr. Twyman wrote you a letter that he had shipped all the cars but six, and that those six were loaded and packed ready for shipment, which appeared to him to be the better plan, to let them come on with the others, so that the requisite changes might be made, &c. Can you tell me what those requisite changes there referred to?

A. Yes, sir; when the cars came on here, the bending of the lever after trying it three or four times, we found that that was not very satisfactory; that it got out of order very readily, so that the dog on the ratchet wouldn't hold. Then our master mechanic suggested another change in the lever, which turned out very satisfactory, both as to location of the lever within easy reach and convenient reach of the gripman and of the brakeman, and then Mr. Twyman approved of that change, and he stated that when he went back to Chicago he would have that change made in those cars that were there, and then he wrote me that letter and stated that the cars were ready for shipment and I had better make the change here.

Q. I want to know whether that was the matter referring to the brake-lever independent of the working of the brakes?

A. Yes, sir; independent of the working of the brakes.

163 Q. Did it in anywise affect the working of the brakes?

A. Not at all.

Q. I believe the west portion of the line, and by that you mean, I guess, west of the power-house?

A. Yes, sir.

Q. The west portion of your line was ready to run cars over in connection with the east end about the 10th of April?

A. Yes, sir.

Q. Well, that was subsequent to Mr. Twyman's return, when he came down here and fixed the brakes in response to your letter of March 23rd?

A. Yes, sir.

Q. The cars were then taken out, were they?

A. Yes, sir.

Q. And the road opened?

A. Yes, sir; the road opened.

Q. What trouble did you find that day with the cars?

A. We found that we couldn't get the brakes to work satisfactorily at all.

Q. What was the trouble with the brakes?

A. The trouble was, when we would adjust the shoes to the wheels

so that they would work all right on the straight track the shoes would have to be set so close that they would bind on the wheels, and when they would come to a curve they would bind on the wheels so hard as almost to stop the rotation of the wheels altogether, and then after going around a couple of curves the strain on the rods was so great as to stretch them, and when we come on the straight track again the brake was perfectly useless.

164 Q. You speak of adjusting. Tell the court what there was in those brakes for adjusting; whether or not there was a nut under the center of the car which could be turned to adjust the brakes the distance you desired the shoe to be from the wheel.

A. Yes, sir; it was what is called an adjusting rod or turn-buckle.

Q. Now, you speak of adjusting the brakes so that it could be used on a straight track?

A. Yes, sir.

Q. What do you mean by that?

A. So that when you would draw the lever up on the quadrant the brakes would bind on the wheels so as to bring the car to a standstill.

Q. That is to say, when the gripman would take hold of the brake-lever to stop the car it would stop on the straight track?

A. Yes, sir.

Q. When the brake was in that condition and you rounded a curve, what was the result?

A. The result was that without any motion on the part of the gripman at all the brakes would set themselves and frequently stop the wheels altogether from turning.

Q. That is to say, if the brakes were thrown entirely off they would bind on going around the curves?

A. Yes, sir.

Q. What about the cars jumping off the track at the time they were going around the curves?

A. They came in and reported to me several times, but I wasn't on any of those cars.

Q. When they started to go up grades what would be the result?

A. When they started to go up the grades they would also bind the wheels.

165 Q. Now, Mr. Lawless, for the purpose of enlightening the court as to one of the necessities for having a brake that would stop the car immediately, you may state whether or not your line crosses different cable lines in its course.

A. Yes, sir; it crosses Troost avenue on the east end and Brooklyn on the west.

Q. How about Walnut street?

A. And Walnut street; yes, sir.

Q. How about Main street?

A. And Main street.

Q. And when they come to make one of those crossings that is done by the gripman?

A. His orders are to stop.

Q. What I mean is does he hold the grip?

A. He releases the grip and applies the brake and stops the car until he gets the signal from the flagman to cross.

Q. You call that the "let-go" when they loosen the grip to cross these tracks?

A. Yes, sir.

Q. How long a distance do they travel over without the grip holding the cable rope?

A. A short distance.

Q. The width of a street?

A. Yes, sir; the width of a street.

Q. What is the necessity of having a brake that will stop the car very suddenly in crossing such places as that?

A. Why, to avoid collision.

Q. Now, after you wrote this letter of March 23rd, or after Col. Morse wrote his letter of April 11th, what took place as to
166 anybody coming down again to adjust and fix these brakes?

A. What letter was that?

Q. I understand the fact to be that Colonel Morse upon the 11th of April, the day after you took the cars out on both ends of the line, wrote a letter to the Pullman people claiming that this same trouble still existed.

A. Yes, sir.

Q. Now, I want to know whether anybody came back again.

A. Yes, sir: Mr. Twyman came back.

Q. About how long after the 10th or 11th of April was it?

A. I think immediately after; a few days after.

Q. How long did he stay here?

A. I think he stayed three or four days, and then a mechanic—one of Mr. Pullman's mechanics—came down.

Q. Do you know how he came to come? How it came about that the mechanic came here?

A. I don't remember whether he came with Mr. Twyman or followed Mr. Twyman.

Q. You may state whether Mr. Twyman worked upon these cars, attempting to fix this brake, while he was here a few days before the mechanic came.

A. Yes, sir; he took one specific car and said that he was going to fix it and leave it in such condition that we wouldn't have to touch it for six months except just merely to adjust the rod a little occasionally, and then he took the car—I remember it was 317—and he looked over it and he found that the rear truck—he stated that the rear truck—that the body of the car wasn't set up high enough over the rear truck. He stated that the details of the brake hadn't been carried out as he designed it. He said that the
167 springs on the brake-beams were not tempered properly, and I can't remember what else he said, but anyhow I then put two men at his disposal and he started in to fix that car.

Q. After he had fixed it what took place?

A. Well, he took it out and tried it, and it worked a little better than the other, and, I think, that was the time that he asked if it was satisfactory.

Q. Where was it that he said that?

A. Right in front of the power-house, after making the trip.

Q. Who was there at that time?

A. I can't remember who was there at the time, but my impression is that Mr. Barnes was there.

Q. What, if anything, after fixing that car and making that trip, did Mr. Twyman say to you?

A. He asked me whether that car was satisfactory and whether the brake was satisfactory.

Q. What did you say to him?

A. I told him that I couldn't say whether it was satisfactory or not then; that in view of the trouble we had already had with the brakes that I would have to wait until the car had made some more trips and then I would tell him whether it was satisfactory or not.

Q. After the car made some further trips what took place?

A. We had the same trouble over again.

Q. You may state whether or not Mr. Twyman, when he left here the second time, stated that he would return to Kansas City.

A. Yes, sir; well, now, I can't say. I can't remember whether he said he would return to Kansas City or not.

Q. Let me call your attention to one of his letters. I find a letter here from Mr. Twyman of date April 24th, 1888, in which he says, "I am sorry not to have been able to return to Kansas City as quickly as I anticipated." I understood you that was after he had been here the second time. After reading that letter are you able to refresh your memory and state whether or not he promised to come back?

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A. I can't remember whether he said he would come back or not. I can't recollect.

Q. In the meantime his mechanic was here at work?

A. Yes, sir; his mechanic was here at work.

Q. What did the mechanic do? Did he work at them?

A. Yes, sir.

Q. And for how long?

A. He worked at them until all but a few of the cars were completed.

Q. Do you remember how many of them?

A. I think about three or four.

Q. You may state whether he said anything to you as to having fixed them so that they would work all right, excepting the three which he had not yet gone over.

A. No; he was a man that didn't say very much, but he seemed to have regular specified directions.

Q. What do you mean by specified directions?

A. That is, he seemed to have a regular routine of work to do on each car.

Q. Written out on paper?

A. I don't recollect whether it was written out on paper or not.

Q. After he had finished all but three of these cars and turned them over to you what, if anything, was the result in their operation?

A. The result was just the same trouble over again—constant blockade of the entire line—adjusting the brakes—men coming in and reporting that they couldn't stop the car anywhere, and then we would fix the brakes and the report would come in that they couldn't run over the crossings by gravitation, and all such reports as that. There was one day after he had been here for some time—I was in the car myself—we had one car that he said that was fixed and we were ferrying it out of the car-house and I noticed there was several men at it and they were pulling very hard and I went up to the man who was there and I said to him, "Is this car fixed?" and he said, "Yes," and I took out my pen-knife and I called his attention to the fact that I couldn't get the blade of the knife in between the wheel and the shoe and I told him that "Such work as that may be very satisfactory to you, but it is not satisfactory to me, and I don't consider that the car in its present condition ought to go out and I will not allow it to go out in its present condition."

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Q. You may state whether or not after he had fixed all of these cars you attempted to use them; all these cars which he had already gone over, except the three as you have already stated.

A. Yes, sir; he attempted to use them.

Q. And you found the same trouble?

A. Yes, sir.

Q. Do you know how long the mechanic stayed here?

A. He stayed here until the time I turned the cars into the power-house and refused to run them any longer.

Q. That was what date?

A. I think that was some time in May—beginning of May.

Q. I will ask you, for the purpose of refreshing your memory, whether you reported the trouble that day to Col. Morse.

A. Yes, sir; I reported the trouble to Col. Morse.

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Q. With that called to your attention and looking at this letter dated the 10th of May, are you able to state the date that the cars were taken off?

A. They were taken off, I think, the night before.

Q. What effect did the binding of these brakes have upon the cable ropes?

A. It had a very damaging effect upon the cable rope and a very damaging effect upon the grips.

Q. Just state to the court wherein there was this effect.

A. Well, in starting a car the brakes would appear to bind from the motion of the car forward, and then if they were not adjusted too close they would appear to clear.

Q. Now, in going around these curves the gripman still has a hold of the grips?

A. Yes, sir.

Q. When the car wheels would bind against the shoes what was the result as to the wheels sliding around?

A. The wheels would slide around and bind to such an extent that the rope would very frequently slip in the grip.

Q. Would that make or wouldn't it make an extra strain upon the cable rope?

A. It would; it would make a very serious extra strain on the cable rope.

Q. What effect did this thing have upon the cable line?

A. The result was that the cable was worn—well, by the time I took the cars in the cable was almost worthless.

Q. Do you know whether the cable broke or not?

A. Yes, sir; it broke I don't know how many times. I think that the day I took them in it broke twice that day.

Q. That was about thirty days after the cars were first put on?

171 A. About thirty days; yes, sir.

Q. What is the ordinary time for a cable rope to last?

A. Well, it depends a great deal on the road over which it is run. On the Fifth-street line, where there are several heavy grades, we got five months' wear.

Q. Take this Twelfth-street line.

A. The subsequent rope, I think, lasted over three months.

Q. What is the cost of a cable rope?

A. About twelve hundred dollars per mile.

Q. Do you remember in round figures what was the cost of this cable rope on the Twelfth-street line that wore out in the thirty days?

A. I think about ten thousand dollars—nine to ten thousand dollars. I don't remember the figures exactly. We paid for the rope by weight.

Q. You had had some experience before this in charge of cable lines in San Francisco?

A. Yes, sir.

Q. Were there any grades there? How were the grades there?

A. They have some lines with grades. They have got one line, I think, with a grade up to nineteen per cent.—eighteen per cent.

Q. Did you ever see any combination cars operated over those grades?

A. Not over such heavy grades as that. I have seen combination cars operated over heavy grades running up, I think, to ten or twelve per cent.

Q. The greatest grade here is on the incline?

A. Yes, sir.

Q. And that is thirteen or fourteen per cent.?

172 A. About fourteen.

Q. Mr. Lawless, some question was asked here about the seats that were furnished the sixteen-feet cars on the Fifth-street line. Will you state what the finish on those cross-seats were?

A. Those seats were patent seats, with rattan springs inside of them.

Q. What were they finished with?

A. The backs the same way, and then covered over with carpet.

Q. You had five Laclede combination cars on this Twelfth-street line?

A. Yes, sir.

Q. You may state whether or not you ever had any trouble with the other brakes.

A. No, sir; no trouble with the other brakes.

Cross-examination.

By Mr. RUNNELS:

Q. You have had a good deal of experience in cable-car management, have you not, Mr. Lawless?

A. Yes, sir.

Q. Both here and in San Francisco?

A. Yes, sir.

Q. Anywhere else?

A. O, yes.

Q. You have made that business a pursuit and a study, have you not?

A. Yes, sir.

Q. It is always true, isn't it, Mr. Lawless, that a new cable road is subjected to more or less annoyance and difficulty in the
173 way of operation?

A. Considerable annoyance if the construction isn't correct.

Q. Isn't it true that that branch of business hasn't been so far developed as to enable you or any one constructing a road to anticipate at the outset all the difficulties that may arise? In other words, are there not a great many adjustments of the drum and cable, and so on, that have to be made as the result of teaching and experience?

A. Not now.

Q. Not now?

A. Not now. In starting up our Fifth-street cable line we only had trouble, I think, the first day, and that was very slight: it took, perhaps, a couple of hours to fix that, and we had no delays afterwards at all.

Q. Do you know anything about the cable railways in Chicago?

A. I know something about the State-street line and something about the North Side.

Q. Isn't — true that the North Side cable line was and has been, during the twelve months since it began to be operated, subjected to a great deal of expense in the way of broken cables, obstruction of traffic, and so forth?

A. Yes, sir; and, in my opinion, it will until the construction is changed.

Q. Yes; I quite agree with you as to that. And isn't it true that the South Side cable road passed through a similar experience?

A. Yes, sir.

Q. Then, you might say, as a general rule, that there is incidentally to the opening of a cable line always more or less difficulty arising from the tendency to break cables until they become adjusted and the machinery gets to working in good order?

171 A. Until the men who have got the road get acquainted with what the requirements are.

Q. Yes, sir; that is it exactly. Now, you were in charge of this road as superintendent at the time the negotiations were begun for these cars, were you not?

A. Yes, sir.

Q. For the Metropolitan road?

A. Yes, sir.

Q. You and Mr. Knight, the engineer, and Mr. Pullman had one or two interviews, more or less, in which the question was discussed of the making of this contract?

A. My recollection is, I think I had only one interview with Mr. Pullman, Mr. Knight, and Colonel Morse.

Q. At that interview the question of the kind of cars in respect to having longitudinal or cross seats was discussed?

A. Yes, sir.

Q. There was at that interview expressed a difference of opinion between you and Mr. Knight as to which were the proper cars for this line?

A. Yes, sir.

Q. You inclined to the view and expressed it, did you not, that the proper cars for use upon this line were the cars with longitudinal seats?

A. Yes, sir.

Q. Will you tell me why?

A. Because the cars with longitudinal seats can carry a greater number of passengers than a car with cross-seats.

Q. Was there any reason in your mind arising from the fact that the car with cross-seats would probably be wider and heavier than those with longitudinal seats?

175 A. The understanding and conclusion then was, my recollection is, that the conclusion we came to then was that the cross-seats were to be put in provided it would not make the car too wide. That, I believe, was the understanding.

Q. Now, then, the agreement at that time, as I recollect, was that the car should be six feet six inches in width—that is, the body width. Do you recall that?

A. No, sir; I don't. That is an unusually narrow width, six feet six.

Q. You would say that that would be too narrow to admit of cross-seats, would you?

A. Oh, yes; I would say that that car would be too narrow even for longitudinal seats.

Q. But at any rate it would be too narrow for cross-seats?

A. Yes, sir.

Q. The width over the sills, six feet six inches?

A. A width over the sills? That is different.

Q. That width, you say, would probably be too narrow to make cross-seats practicable?

A. Well, really I don't know.

Q. That would be your judgment, would it not, that it would be too narrow?

A. Yes, sir.

Q. Now, then, the cars were ordered and combination cars were ordered. What would you say, as a matter of judgment based upon your experience in this business, as to the propriety of using combination cars upon a line with such curves and grades as the line of the Metropolitan railway?

A. So far as the curves are concerned, the combination cars are preferable.

176 Q. How with regard to grades?

A. Are preferable on account of the easy motion in going around the curves.

Q. How is it as to grades?

A. Well, as to grades, I would prefer the train.

Q. Isn't it true, as a matter of fact, that you did prefer for this line, even for the filling of this contract, train cars rather than combination cars, and that you so expressed yourself?

A. I certainly was in favor of the train. I don't know whether I expressed myself so or not. I believe I did.

Q. On two or three occasions, did you not?

A. I have always preferred the train; yes, sir.

Q. And you didn't hesitate to express that preference?

A. (No answer.)

Q. The Pullman Company had built cars for the Metropolitan Company before and during your superintendency, had they not?

A. Yes, sir.

Q. They had had two contracts for construction?

A. Yes, sir.

Q. In both cases either you personally or some one for your company was sent to the works to inspect the cars there?

A. That I can't recollect. I really don't know whether I went to Chicago to inspect cars or not.

Q. You don't recall the fact?

A. I don't recall the fact; no, sir.

Q. I understood you to say in your direct examination that when you went to look at the cars in Chicago there were ten of them that were substantially done except in the particulars that you spoke of—the absence of a gong and life rods, and so on—and that the general appearance of the cars was very satisfactory.

177 A. Yes, sir; except that I stated at the time that I thought they were pretty heavy.

Q. You thought they were pretty heavy?

A. Yes, sir; I thought they were pretty heavy.

Q. Now, after that the cars were shipped here. One question before that as to the life rods which were not put on. Is it customary to put life rods on before shipment?

A. The guards?

Q. The guards, I mean.

A. No, sir; it is not.

Q. So that the absence of those did not indicate any lack of completeness?

A. No, sir.

Q. It is true of a brake, isn't it, that the nearer the brake-shoe can be to the wheel, providing it doesn't interfere with the running of the wheel—the operation of it—the better it is, and there is less loss of power in the application?

A. No, sir.

Q. It is not?

A. I don't think so; not in my opinion.

Q. Now, one of your objections, at least, and the one that has been emphasized, was that these brake-shoes were too near the wheel, so that the brakes set themselves in going around the curves?

A. Yes, sir.

Q. Now, suppose those brake-shoes had been an inch from the wheel instead of the distance it was, what would you have said about that? That then they would have worked all right?

A. If you get the lever and pull it on and apply the shoes to the wheel, then could you say whether it worked all right or not?

Q. Yes; but in your judgment if the distance had been an
178 inch, the space had been an inch between the brake-shoe and the wheel, or an inch and a half, we will say, they would have worked all right.

A. Well, I think if it had been an inch they would have worked all right.

Q. That was the distance, was it not, or about the distance of the Laclede brake-shoe from the wheel?

A. Yes, sir; fully an inch.

Q. Now, those brakes worked all right under the Laclede cars?

A. Yes, sir; they worked all right.

Q. Suppose you had had authority or had been instructed to have removed these brake-shoes or set them back—as could have been done—an inch from the wheel, then, in your judgment, they would have worked all right?

A. Those brakes, you mean?

Q. Yes.

A. No, sir.

Q. You think they would not?

A. I am satisfied they would not.

Q. The Laclede brakes could have been applied to those cars, could they not?

A. I don't know whether they could or not.

Q. Was any effort made to determine that fact?

A. No, sir.

Q. None was made?

A. No, sir.

Q. Now I will ask you, as a matter of opinion of an expert, what would have been the cost of substituting such a brake as the Laclede brake to these cars?

Counsel for defendant object as immaterial and incompetent.

179 By Mr. RUNNELS: If the court please, Mr. Morse says, in his letter dated April 11th, "If you will send a practical man here to take charge of these necessary changes it will be the best plan; otherwise we shall be obliged to make them and charge you with the expense." Now, then, if they propose to assume the duty of making these cars all right, it is certainly competent to show what would have been the expense of making such a change, and I do not suppose there will be any difference between me and my friends as to the duty of people accepting and holding manufactured goods up to the extent, at least, of making certain expenditures before they have a right to destroy the property. They may elect to do one of two things: They may either retain the property and make the necessary expenses to put it in good condition or they may rescind the contract and return the property. We claim that they retained the property, and upon that theory it seems to me this testimony is competent.

By the COURT: That letter of Colonel Morse to the Pullman Company tells them that they can either send a man here to make these changes or he will have it done and charged to them. Now, you elected to send a man here to make the change yourself; and having made the election to send a man here to make the change, and without asking them to do it, are you in a position to say that they ought to have made them or ought to have put another brake on these cars?

By Mr. RUNNELS: I don't understand, if your honors please, that our sending a man here to make certain changes would re-
180 lieve the defendant company, if they elected to keep the cars—would relieve them from the obligation to make these changes and corrections.

By Judge PHILLIPS: The question here is his letter says, "We will make those changes and charge them to you unless you send a man here to do it," and you elected to send a man here to do it. Now, after doing that, you want to hold them liable for not doing it themselves.

By Mr. RUNNELS: Well, as I said before, I don't consider they were discharged from doing a duty imposed upon them by law because we voluntarily and outside of the line of our duty did something for them.

By Judge BREWER: Then it is for them to show what it would cost to make the change, and if they fail to show that the court will not guess at an amount of five hundred or five thousand dollars in their favor. If you show the fact that the change could have been made, they practically say to the court, that we don't make any claim.

By Mr PRATT: One word right there, if your honors please: I am afraid that your honor does not exactly understand our defense. We claim that we had a right, after testing these cars and finding that they would not work, to rescind the contract and return them. We did undertake to do so by our letter of May 12th, 1888. Now,

if we did not and if we could not have done it at that time, then as a matter of course we have to pay this contract price without any question as to what it would cost us to have made them good, unless we see fit to attempt to recoup. In our answer we have not claimed the right to recoup any damages that may have been occasioned by defects in the cars.

181 By Judge BREWER: That is the reason I asked if there was anything under the pleadings.

By Mr. PRATT: There is not a word: we don't undertake to recoup any damages by reason of the article not being as we contracted for: nothing of the kind. We claim that it was a condition precedent to their right to recover that those cars should be fit for the purpose for which they were intended and of which they knew at the time they entered into the contract. We claim that although Mr. Lawless went there and inspected ten of those cars at Chicago, yet that he did not accept them; that they might have held them there under the terms of the contract until they were accepted and not sent them on, but they did send them on afterwards without that acceptance, and that we never accepted them and did not intend to until we saw whether they would work or not. We found they would not work and immediately notified them. Did they then say to us, You have inspected and accepted those cars and the doctrine of caveat emptor applies to you; if there is anything wrong you must make it good yourself? Certainly not. They wrote and said they would send their engineer here, and that the trouble would be remedied without any expense to us. True, Colonel Morse wanted to know what they would do; and, not knowing how serious the defects were told them that if they would not remedy those defects he would have it done and charge the expense to them. Did they let us do it? Not at all. They wrote us that those defects would be remedied at their expense and at no expense to us, and they sent their man on here, and from that time up to the time we undertook to rescind

182 that contract and return the property to them, telling them the property was at their order, one of their men was here endeavoring to fix toohose cars—either their chief engineer or a man representing them—and the letters here show that they never undertook to hold us or claimed that we had inspected and accepted those cars; so that from that time forth they were at our risk, and as I say, there is nothing at all in the answer undertaking to recoup any damages on account of the articles not being of the kind contracted for. All the damages we have set up a counter-claim for are those which we sustained in the using and testing of these cars; but our main defense is that the cars were not of the kind contracted for; that there was a breach of their implied warranty, and that we, within a reasonable time, rescinded the contract and offered to return the cars to them, and hence are not liable for the contract price; and then, in addition, we claim the right to recover upon our counter-claim for damages to our other property during the time of testing these cars.

Objection sustained. Counsel for plaintiff excepts.

Q. Mr. Lawless, were there cars built by the Laclede Company that were in operation upon the line of the road at the same time as these cars in question?

A. There were, I think, two. I really don't remember what date they came, but we were running them, I know, in conjunction with the others.

Q. How did those compare with these Pullman cars in weight?

A. They were lighter.

Q. How much?

183 A. Well, I can only tell from the statements of Mr. Pullman and of Mr. Stone, of the Laclede Car Company.

By Mr. HAGERMAN: Never mind that unless you know.

By the WITNESS: That is all I know.

Q. Now, you stopped the operation of the cars built by the Pullman Company, as you recollect, on the 10th of May?

A. The 10th; yes, sir.

Q. You operated for a day afterwards with the two cars you put on of the Laclede Company?

A. No; I had more. I took some cars off the Fifth-street line.

Q. So that you had four cars in operation the next day?

A. I really don't remember. I think not much over four.

Q. Isn't it a fact that the cable broke the next day while you were operating but these four cars?

A. Yes, sir; I don't know that it was the next day, but it was soon after that.

Q. While you were operating but these four cars?

A. Yes, sir.

Q. Now, Mr. Lawless, was there more than one curve of thirty-foot radius upon the line?

A. No, sir.

Q. That was just at the entrance to the power-house?

A. Just at the entrance to the power-house.

Q. Is the grip always on in running the cars from the line into the power-house or onto the line from the power-house?

A. No, sir.

Q. Did you have any division superintendents under you?

A. Yes, sir.

Q. How many?

A. One.

184 Q. That was Mr. Barnes?

A. Yes, sir.

Q. He was in charge of the power-house of the Twelfth-street line last summer?

A. Yes, sir.

Q. What was the difference between the brake in use upon the Laclede cars, as we have designated them, and those on the cars that were built by the Pullman Company?

A. The brake-shoes, I think, were the same; the brake-beams and the connecting rods were different.

Q. The difference was in the brake-beams and connecting rods?

A. Yes, sir.

Q. Well, without asking you for a description of the mechanical differences or technical differences, didn't the principal difference consist in the fact that the Laclede brake-shoe was further from the wheel and allowed more space than the Pullman brake?

A. Was that the reason that it worked badly, do you mean?

Q. Wasn't that the principal difference?

A. O, no, no; there were ever so many more connections under the Pullman car in order to accomplish the work than under the Laclede car.

Q. These brakes frequently require adjustment, do they not; tightening and loosening?

A. No; not over once a week, except after the first couple of days.

Q. As the brake-shoes wear away, doesn't the brake need tightening up?

A. Oh, yes; but the brake don't wear away very rapidly.

Q. What is the life of those brake-shoes?

A. They will last from three to four months.

Q. How often are those cars inspected? Did you have a
185 daily inspection?

A. Of those cars?

Q. Yes; while in operation?

A. O, yes.

Q. Was the question raised as to whether or not it wasn't proper to have them inspected at the end of each trip? Didn't Mr. Twyman or some one who came down here to talk to you about that say that to you?

A. I think he said something about inspection, and we had men every night to look over the cars and fix them and attend to them.

Q. You had an inspection, then, at the end of the trip every day and night?

A. We had an inspection every trip, because almost every trip the car came up out of order and a man had to go under it and fix it.

Q. Who attended to this matter of the adjustment of the brakes; was it the gripman—the man in charge of the grips?

A. No, sir; we had a special man for that.

Redirect examination.

By Mr. HAGERMAN:

Q. These Pullman cars, as to their brake appliances, were all alike?

A. Yes, sir.

Q. Tell a little more in detail, Mr. Lawless, the difference be-

tween the brake on the Laclede car and this brake on the Pullman car.

A. Well, the brake on the Laclede car had, I think, only two cross-levers underneath; I can't remember now whether it was one or two; the arrangement of it was very similar, and the
186 brake-beams on — Pullman car were of an entirely new style that they had adopted for these cars.

Q. What do you mean by a new style?

A. Well, instead of being one continuous solid beam they had it made, I think, three-quarters-square iron, bent in an angle shape, with a brace in the middle.

Q. You mean that it was a new kind of brake?

A. It was a new kind of brake-beam.

Q. You said something about if the shoe of the Laclede cars was one inch from the wheel you could use them. I didn't understaad what your testimony in that regard was.

A. The testimony about the Laclede car having that distance between the shoe and the wheel? Of course, when it went around the curves the shoe didn't bind upon the wheel.

Q. Do you mean to say or did you mean to say that by an examination of these cars standing still you could tell anything about this trouble as to binding upon the curves and in going up the Twelfth-street grades?

A. You can't tell anything about the working of a brake upon a street car until you try it.

Q. How did these cars look as to their brakes when they were brought into the power-house until you tried them?

A. They looked all right. We pulled the brake-lever over and they seemed to turn the wheel all right.

Q. Did you ever tell any person out at the power-house, in 1888, that these Pullman cars were for sale?

A. No, sir.

Q. Did you ever authorize your assistant or anybody under you to make such a statement or to sell them?

A. No, sir; because I didn't have authority myself.

187 Q. You saw the cable rope after it broke the next day?

A. Yes, sir.

Q. What was its condition as to being worn out?

A. It was in a wretched condition; wires all brok-n and strained and pulled out of shape.

Recross-examination.

By Mr. RUNNELLS:

Q. I want to ask you a question or two that I omitted. Were the Laclede cars continued in use?

A. Yes, sir; they were continued in use up to the time I left the Metropolitan.

Q. You don't know whether or not they are still in use?

A. I don't think they are; I haven't seen them.

Q. Which are the more expensive cars, those constructed with the longitudinal or those with the cross seats?

A. I expect the cross-seats are more expensive.

Q. As a matter of fact that is so?

A. Yes, sir.

Witness excused.

R. J. McCARTY, called on the part of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. HAGERMAN:

Q. I believe, Mr. McCarty, you were auditor for the Metropolitan Street Railway Company for a certain length of time?

A. Yes, sir.

188 Q. When did you become general manager?

A. On the 1st of June, 1888.

Q. Something has been said about the Laclede combination car being taken off the Twelfth-street line last fall and not being used. Now, will you explain to the court why you are not using those cars upon that line to-day?

A. Well, the cars are much wider than the equipment that was ordered to replace these Pullman cars. It was thought best not to have two kinds of cars running on the line.

Q. First tell how the new equipment is equipped as to having running boards upon the side of the car for the fall length of the grip and coach.

A. For the full length of the grip car and coach when it is a summer car and people get in the habit of riding on the sides.

Q. You mean riding on the foot-board at the side?

A. Yes, sir; they will get on and move about from one seat to another as the car goes along.

Q. And you thought, as I understand you, by running those cars people might be misled by them and get hit?

A. Yes, sir.

Q. And that was your reason for taking them off?

A. Yes, sir.

Q. And since you have taken them off have you had occasion to use them when you needed and extra supply of cars?

A. We used them in September during the Priests of Pallas parade. We used them then to fill out the equipment as extra cars.

Q. After this mechanic that was down here for the Pullmans in April and May last year and just before the cars were taken off did you go out and make an examination of those brakes?

A. Yes, sir.

189 Q. At whose instance?

A. At the instance of the president of the company.

Q. What experience or mechanical knowledge have you as to such matters? What study have you given this subject?

A. Well, I have given mechanics more or less study all my life.

Q. Did you look over this work that the Pullman mechanic had done?

A. Well, he wasn't there at the time I made the examination.

Q. I don't understand that.

A. I didn't see any of the Pullman men at all; I don't know.

Q. But you examined the cars?

A. I examined one car. I asked Mr. Barnes to show me the car, and Mr. Barnes or somebody that was in charge, Mr. Simmons, one or the other—I have forgot which—showed me the car which Mr. Pullman's man had fixed and exhausted all his resources upon. He pointed out this car.

Q. Then did you try it on the road?

A. No, sir.

Q. Did you try it upon the curves?

A. No, sir.

Q. What I wanted to get at was the time you tried it upon the curves. When was that?

A. That wasn't until last March, about a month ago.

Q. What did you find the trouble with the brakes? Or just a word in explanation first about trying the car last March. Where were the Pullman cars?

A. They were in Wyandotte.

Q. Stored in a storehouse?

A. Yes, sir.

190 Q. North line?

A. Yes, sir.

Q. You have some expert witnesses in this case, I believe?

A. Yes, sir.

Q. And you went over there with them to make an examination of these cars so that they could testify in this case?

A. Yes, sir.

Q. Now, what trouble did you find with the working of those brakes?

A. I found that when the brakes were properly set and adjusted, as near as we could tell in the power-house, for operation upon a straight track that when we took it off onto the curve in front of the car-house the wheels would slide under the brake.

Q. Suppose you fixed it so they wouldn't bind—put the shoe so far from the wheel that they wouldn't bind upon the curve—what was the result, then, when you had them on the straight track?

A. You could easily throw the brake-lever over the whole length of the quadrant.

Q. Would the shoe touch the wheel?

Counsel for plaintiff object to the question as leading, incompetent, irrelevant, and immaterial.

Q. Just describe the workings of them.

A. Describe what I did over there?

Q. Yes.

A. As I say, I adjusted those brakes so that, as near as I could tell, they were fit to go out on the line of straight track. Of course,

there is a straight track in the house and that is what I had to use as a basis for adjusting them, and I hitched some mules to the car and pulled it out on the straight track and the car ran all right until it struck a curve, and as soon as it did that the brakes set up and the wheels slipped. I tried that several times with the
191 same result.

Q. Now, what, if anything, did you do with reference to unloosening the brakes so they wouldn't bind?

A. There is a turn-buckle under the center of the car for adjusting it and I loosened that turn-buckle so that the car didn't bind on the curve, and then I found out we couldn't get pressure enough upon the wheels to control the car upon a straight track.

Q. What do you mean by controlling the car?

A. To stop it by setting the brake.

Q. What is the necessity of a proper brake appliance upon such a cable road as the Twelfth-street line?

By Judge BREWER: There is no use taking up time with testimony upon that matter.

Q. Mr. McCarty, did you ever authorize any one or did you ever say yourself to anybody last June out at the Twelfth-street power-house that any of these Pullman cars were for sale?

A. No, sir.

Q. When these cars were rejected what was done as to storing them?

Q. There was a building erected over on the company's ground in Wyandotte, near the car-house there. The cars were stored over there in that building.

Q. Can you tell me the amount of the freight charges that was paid upon these cars in receiving them here?

A. The record shows there.

Q. You were the auditor?

A. Yes, sir.

By Mr. RUNNELLS: Just figure it up, Mr. Hagerman, and your statement of what Mr. McCarty will swear to may be entered in the record.

192 By Mr. HAGERMAN: All right. I have the statement figured out here. Now, we have charged here the amount of freight charges on the cars, the switching charge to the Belt road here at Kansas City, and the drayage of the cars from the railroad depot out to the power-house. The total amount is $2,936.30.

Mr. RUNNELLS: Whatever your statement shall be of the amount of those charges may go into the records.

(Copy of statement of freight charges above referred to is hereto attached and marked Exhibit —.)

Q. There is one question more. These brakes that were upon these Pullman cars—you may state if they were the same as upon other cable cars.

Counsel for plaintiff object to the question as incompetent, irrelevant, and immaterial.

Question withdrawn.

Q. You may state what, if anything, has been done as to changing those cars since they have been stored; since they were taken off the line.

A. Changing the brakes, you mean?

Q. Yes.

A. Nothing whatever.

Q. Are they in the same condition now as they were when you took them off the line?

A. Yes, sir.

Q. What would you say as to the ability of a man, going to the manufacturer's shop and looking at these cars in the shop, determining whether this brake would work upon the curves of the Twelfth-street line?

193 Counsel for plaintiff object as incompetent and immaterial.

By Mr. RUNNELLS: I suppose, of course, that the question is directed to the inability of Mr. Lawless or any one sent to Chicago to inspect the cars to determine whether the brakes would work or not. The contract provided for inspection in Chicago. It was competent for the inspector to ask for whatever he wished, to ask for such exhibition of the property as he might desire, and it is not in evidence that Mr. Lawless asked for any trial of these cars by sending them upon a curve or working them up and down the line or any other way. Indeed, the witnesses testified upon our side that Mr. Lawless made such inspection as he desired and was not denied any examination that he wished to make. Having contracted for an inspection of that sort and having chosen their agent to make the inspection, it seems to me it isn't competent for them to turn around now and say that they did not contract for a sufficient inspection if it wasn't sufficient. I also object on the ground the witness has not been shown to be competent to testify as an expert.

Q. Just explain to the court your experience or studies enabling you to form a judgment upon this subject—what you have done and studied.

A. I was educated as a civil and mechanical engineer at the University of Virginia, and have given constant attention to it all the time I could spare from my other duties ever since I left there.

Q. How much experience have you had on a cable road and in the management of it?

194 A. I have been with the Metropolitan Company ever since it was organized, and made a close study of the mechanical details of cable railroads.

By Mr. RUNNELLS:

Q. Isn't it true that you have been simply a book-keeper and

accountant since your graduation up to the time of your appointment as manager, last summer?

A. No, sir.

Q. You were the auditor of the company?

A. I was auditor of the company; yes, sir.

Q. Had you been appointed as a civil engineer to serve in any capacity?

A. Yes, sir.

Q. When?

A. I served five years on railroads in Texas.

Q. As civil engineer?

A. Yes, sir.

Q. What roads?

A. I served on the International and on the Houston and Great Northern. When I started I had charge of the division of the International road, and I was assistant chief engineer of the St. Louis Narrow-gauge road.

Q. Had you had any experience in the operation and management of cable roads until last summer?

A. No, sir.

By Mr. RUNNELLS: I still insist upon the objection.

Objection overruled. Counsel for plaintiff except.

195 Cross-examination.

By Mr. RUNNELLS:

Q. I didn't understand you as to why you discontinued the use of the Laclede cars. You said they were wider, but, now, what is the objection to using a wider car?

A. The objection to using a wider car was because there was only five of those Laclede combination cars. It wasn't necessary to complete the equipment; at least, the equipment had been completed with narrower cars, and I didn't think it a good thing to run those Laclede cars in among the narrower cars.

Q. The Laclede cars are combination cars, are they?

A. Yes, sir.

Q. You wouldn't run a combination car in the middle of a train?

A. No, sir; I mean run the combination cars interspersed with the others on the road.

Q. What is the objection to that?

A. In running the narrower cars people get in the habit of standing on the outside on the running board or exchanging seats. A man *very* riding on the grip car will want to change his seat and will get down on the running board and walk backward and forward to another seat, as the case may be, and there is no danger in doing that when passed by cars of a train of the same kind, as the cars are sufficiently narrow to leave sufficient space between them.

Q. Oh, I see; the Laclede cars were so wide that it made it dangerous for people to pass along on the outside of the cars?

A. Yes, sir.

Q. Then, the Pullman cars were so wide that it made it dangerous for people to pass along the outside of them?

A. Yes, sir.

196 Q. Wasn't there a man killed between two of those cars just before they were taken off?

A. I think not.

Q. Wasn't there a man injured?

A. There was an accident; I think a man was injured.

Q. By being crushed between two of these cars?

A. I don't know whether it was the Pullman cars or the others.

By Mr. HAGERMAN:

Q. Do you know personally about it, Mr. McCarty?

A. I didn't see the accident.

By Mr. HAGERMAN: We object upon the ground that we know precisely what that accident is. It was a case where a gentleman was attempting to jump on the car, missed his hold and dragged along, and another car coming along struck him.

By Mr. RUNNELLS: The case I have in mind is another one.

By Mr. HAGERMAN: Ask somebody that knows personally about it.

By Mr. RUNNELLS: This is an officer of the company.

Q. It is true, is it not, that a man was caught between two of these cars and injured or killed?

A. Well, I can't say as to that of my own knowledge, because I didn't see it.

Q. You, as auditor, never settled any claim for any injury of that kind?

A. No, sir.

Q. No claim was ever settled by the company for an injury of that kind?

197 A. I don't remember that there was.

Q. If any such claim had been settled you would have known about it necessarily, would you not?

A. Yes, sir; I would have known it.

Q. Now, do you wish to be understood as saying that no such claim was ever settled for the company for any injury of that kind?

A. Well, a claim of that kind might easily be settled and I not remember it. We settle a great many of those claims.

Q. You said a few minutes ago that you had knowledge of some man being injured. Where did you get that knowledge?

A. I am speaking only of what I saw from the record.

Q. What record?

A. From the reports of the accident that came in.

Q. Report of the accident that came to you as an officer of the company, do you mean that?

A. No, sir; it didn't come to me in an official way at all.

Q. Was it an official report?

A. I can't say as to that.

Q. Isn't it true, as a matter of fact, that the Laclede cars and the Pullman cars were of such width that it was unsafe to pass, as you stated a few minutes ago, along the outside of the cars—along that foot-rest, or whatever you call it—when those cars were passing each other? Isn't that true?

A. To answer that question positively, of course, I would have to make an experiment to see of my own knowledge. From what I have understood I could make an answer, but from my knowledge I couldn't do it.

Q. You never saw the cars actually pass, perhaps. Now, isn't that the reason, or one of the reasons, why those cars were withdrawn from that line—that those cars were too wide to be
198 operated with safety?

A. No, sir; it was not.

Q. Then you would say it is entirely proper for a street railway company to operate cars which run so near each other as to endanger human life? You said a few minutes ago that it wasn't safe and that was the reason why you used narrower cars.

A. The cars could be very easily arranged, so that people couldn't get in between them.

Q. So that people couldn't pass along the outside of the cars?

A. Yes, sir.

Q. Isn't that depriving cable cars of one of the advantages they are supposed to possess: that people can pass along the outside? Isn't that one of the advantageous features of the cars: that people can walk from seat to seat?

A. It is preferable to have them that way.

Redirect examination.

By Mr. HAGERMAN:

Q. Mr. McCarty, as I understood, the reason you gave why you didn't run these Laclede cars interspersed with the others was that there is an outside foot-board upon which people get into the habit of riding——

A. Yes, sir.

Q. —and, interspersing with a wider car passing it, there is a likelihood that people, not having any warning that a wider car is being used, will be injured?

A. Yes, sir.

Q. Do you know the weight between the Laclede car and the Pullman car?

199 A. I know it in this way: I have had one of each of the cars weighed and the weights reported to me. The difference was six hundred pounds.

Q. Which was the heavier?

A. The Pullman car was heavier.

By Mr. RUNNELLS:

Q. You said the difference was six hundred pounds?

A. Yes, sir.

Q. Do you recollect the weights of the two cars?

A. The Laclede car weighed 11,900 pounds and the Pullman 12,500.

Witness excused.

ROBERT GILLHAM, called on the part of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. HAGERMAN:

Q. What is your business, Mr. Gillham?

A. Civil engineer.

Q. What connection have you with any of the Kansas City cable lines, and how long have you been so connected?

A. I have been associated with their construction since their infancy.

Q. Upon what line are you engaged now?

A. I am engaged on the Kansas City railway, on the Interstate, and on the People's railway.

Q. Have you had any experience with cable roads in any other places?

A. Yes, sir.

200 Q. Just tell us where and what experience.

A. I constructed the roads in Omaha and am constructing the roads in Denver and I have been consulted with reference to their construction in other cities.

Q. Did you make an examination of one of these Pullman cars in controversy here as to the operation of its brakes upon curves?

A. Yes, sir.

Q. When was it that you made the examination?

A. I think about two weeks ago.

Q. What was the condition of things? What was it you found?

A. I went with Mr McCarty to the Twelfth-street power-house. I found a car there on the track. I went under it and examined the brakes, and I asked to have it pulled out onto the track, so that I might see it upon the curve at the entrance of the power-house, and that was the extent of the examination.

Q. In doing so was it necessary to pass it around the curve?

A. Yes, sir.

Q. Now, what was the workings of the brake?

A. In passing the cars along the track the wheels rotated properly until they came to the curve and as the trucks passed the curve the wheels became locked and couldn't rotate, but slid along the track.

Q. Suppose the brakes were set so that you could pass it—suppose the brakes were unloosened so that you could pass the car around the curve, then what was the result upon the straight track?

A. I tried the adjustment of the brake-sills—we could get at it under the car—allowing the swing of the brake-shoe to be greater than it was when I first saw the car, and had the brake thrown on

and it didn't quite come in contact with the periphery of the wheel.

201 Q. That was the result with the brake set that way?

A. There would be no efficiency of the brake under those circumstances.

Q. For the purpose of stopping the car?

A. Yes, sir.

Q. Now, I wish you would state to the court whether or not an examination at the shop of the manufacturer—whether or not an inspection of those brakes would disclose the fact that they would or would not work on the Twelfth-street line—upon the curves and grades of that line.

A. Certainly not. They couldn't be——

Counsel for plaintiff object as incompetent, irrelevant, and immaterial. Objection overruled and exception taken.

—they couldn't be inspected unless they were subjected to an absolute trial on the street, because of the grades and curves in it.

Cross-examination.

By Mr. RUNNELLS:

Q. You say they couldn't be inspected without a trial on the street?

A. Not a proper inspection; no, sir.

Q. Couldn't you tell, with the experience you have had in cable roads, whether or not the brake is properly constructed?

A. You might have an opinion that it was properly constructed and it may look like it was properly constructed and yet it might prove to be inefficient in its service upon the road.

Q. The operation of the brake isn't a matter of chance?

A. It ought not to be.

202 Q. It is subject to rule?

A. Yes, sir.

Q. As to construction?

A. As to construction and conditions in which it is to be used.

Q. If those rules are followed the brake ought to be a proper brake?

A. There are no fixed rules in the construction of brakes. You are limited to the rules and conditions of the road over which the brake is to be used.

Q. The road makes the rules and conditions?

A. Certainly.

Q. Then a person who is in charge of the road ought to be able to determine whether or not the brake is a proper brake?

A. Yes, sir; I should think so.

Q. From an examination of the brake?

A. From an examination of the brake and a test on the road.

Q. Why a test on the road? Can't he tell whether the brake is a properly constructed one if he knows the conditions of the road?

A. He ought to be able to tell it; yes, sir.

Q. According to your theory the construction of a brake is largely a matter of chance or experiment?

A. I think a man acquainted with the road ought to be able to determine whether or not the brake would serve the purpose for which it was intended.

Q. You think so?

A. I think so; yes, sir.

Q. Do you know about the operation of the Metropolitan road at the time these Pullman cars were put in use? The time was last April, 1888?

A. Was I familiar with the road, you mean?

203 Q. Yes, sir; and familiar with its operation in a general way?

A. Not in an individual way, but simply as a citizen I noted their operation.

Q. Do you know anything as to the condition of the power-house an- machinery?

A. I know something about it; yes, sir.

Q. Would you say that it was in good condition?

A. I am not sufficiently informed upon that to give an opinion, because I am not familiar enough with the details and construction to say.

Q. You couldn't say whether or not any portion of the troubles or difficulties that the company experienced during that month were due to the condition of its road or power-house?

A. No, sir; I couldn't say.

Q. Or to the construction of the road?

A. No, sir; I wasn't familiar enough with it.

Q. You are familiar with the curves and grades of the Metropolitan road, are you not?

A. Yes, sir.

Q. What would you say as to the propriety of the use of a car weighing 12,500 pounds—a combination car—thirty-three feet in length and eight feet three inches in width, upon such a line as that—such cars as you saw?

A. I don't think it would be desirable to operate cars of that kind.

Q. Couldn't you put it a little stronger? Wouldn't you say that those cars were not suited to that kind of a road and grade and curvature?

A. Not being familar with the details of their construction

204 and machinery, it wouldn't be safe for me to express an opinion on that. I might not be correct in it.

Q. So far as the construction of the car is concerned—you testified a few minutes ago that you examined a car?

A. Yes, sir; I examined a car.

Q. What would you say as to the operation of cars of such size and width—cable cars upon a cable road—as that people couldn't pass in safety upon the outside of the cars along the footwalk without danger of being caught and injured?

A. I think it would be a very serious objection to their use.

Q. Couldn't you put that a little stronger? Wouldn't it be absolutely dangerous for such cars to be *sued*?

A. I shouldn't care to recommend the use of cars of that character.

Redirect examination.

By Mr. HAGERMAN:

Q. I understood you, in answer to one of my questions, to say that you thought an inspection at the house of the manufacturer of one of these cars would not disclose whether this binding would take place upon the curves?

A. Yes, sir; I said that.

Q. And then I understood Mr. Runnells to ask you the same question and your answer to be different. Will you please now state—it may have been my misunderstanding—whether, in your judgment, a person going to the manufacturer's shop and seeing one of those cars there could determine, with a knowledge of the Twelfth-street curves and grades—could determine how that
205 car would operate and whether he could use them upon the curves and grades there?

A. I don't think they could so far as the operation of the brake goes. It depends entirely upon the adjustment of the brake; it might approximate the right limit and it might not. A casual observation wouldn't determine that.

Q. That is what I am asking you, as to the brake proper.

Recross-examination.

By Mr. RUNNELLS:

Q. Now, Mr. Gillham, referring to the last question, wouldn't you say that a man who was in charge of the operation of a cable road, familiar with its curves and its grades, such familiarity being acquired by the operation of cars thereon, ought to be able to say, from an examination of the brake, as to whether or not such brake would do for such cars upon such a road, leaving the question as to whether or not they were properly adjusted to be determined by actual experiment and trial?

A. I think if a manager of a road had had experience with that character of car and brake he ought certainly be able to determine to some extent or approximate the adjustment of it; if he hadn't had any experience with that particular brake and that construction of car he couldn't do it; it all depends on that.

Q. But if he had such knowledge as I describe in my question and you have described in your answer ought he not to be able to determine whether or not that brake, being properly adjusted as the result of experience in operation—the adjustment now I am speaking of——

A. Yes, sir.

206 Q. As to whether or not such a brake would answer the purpose for which it was intended?

A. If he had had the requisite experience in the adjustment of those brakes he ought to determine: if he had not, he couldn't.

Q. Do you mean those particular brakes?

A. Yes, sir. Brakes vary so much in the construction of these cars that it is very difficult to determine by any rule or method or by looking whether or not they will serve the purpose for which they were intended. The knowledge as to the question of adjustment of brakes is based wholly upon experiment or experience; without that experience you cannot determine, of course, and cable railways have experimented to some extent. These cars were new in their design of brake; it would be very difficult for them to determine about it; it would be very difficult for anybody to tell what it would do on the street, not being horse cars, without experiment.

Q. But a person could approximate to it?

A. Oh, yes; he could approximate.

Witness excused.

CLARENCE A. BURTON, called on the part of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. HAGERMAN:

Q. Mr. Burton, what is your business?

A. Superintendent Industrial iron works, in this city.

Q. What experience have you had or study have you made as a mecha*cha*nic?

A. I have been following the machinist's trade and manu-
207 facturing business for upwards of twelve years.

Q. Did you go over with a number of gentlemen to examine one of these Pullman cars that are in controversy?

A. Yes, sir.

Q. What difficulty, if any, did you find with the operation of the brakes?

A. Well, it appeared that upon adjusting the brakes for a straigh-track the wheels locked fast on a curved track.

Q. You speak of adjusting for a straight track. What do you mean by that?

A. I mean by lengthening or shortening a certain turn-buckle under the center of the car until the proper throw of the lever in the car upon the quadrant brought the brake-shoes against the wheels on a straight track.

Q. So that the car stopped?

A. Yes, sir; so that the brakes then locked the wheels on the curved track.

Q. And what was the result when the brakes were loosened so that they wouldn't bind on the curve?

A. Then it appeared, by unloosening this turn-buckle so that it was within range of the gripman's brake-lever to bring the brake-shoes fast on the curved track, that the brakes refused to hold the cars on the straight track.

Q. What would you say as to this: Suppose a man went to the manufacturer's shop to inspect one of these cars, which was desired for the Twelfth-street line, with the grades and curves, of which I presume you know generally, could or could he not by that inspection tell how these brakes would work?

A. I don't think he could.

208 Cross-examination.

By Mr. RUNNELLS:

Q. What experience have you had in the operation of cable cars?

A. I never had any direct experience in the operation of cable cars.

Q. On what experience or knowledge did you base your answer to the last question of Mr. Hagerman?

A. On the experience that a mechanic might have in general.

Q. And that only?

A. Yes, sir; that only.

Q. Where did this inspection or this examination of this car take place?

A. Well, I made one examination at Wyandotte, at the Wyandotte car-house, and I made another one at the Twelfth-street power-house.

Q. The car was brought over to the Twelfth-street power-house?

A. Yes, sir; and there is one there now.

Q. I can't say the exact date. It was something like two or three weeks ago.

Q. Recently?

A. Yes, sir; recently.

Q. There is one curve just outside the power-house that is rather more pronounced than any other curve upon the line?

A. I can't tell you as to that.

Q. Did this difficulty that you speak of arise generally upon the curves or at any particular curve?

A. Well, it arose on the curves in general, I believe.

Q. Of course, greater in some than in others?

A. Of course, the greater the curvature the greater the difficulty would be.

Witness excused.

209 CHARLES CHAPMAN, called on the part of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. HAGERMAN:

Q. What is your business, Mr. Chapman?

A. Master mechanic on the Ninth-street cable line.

Q. About how many miles of cable line have you under your charge?

A. Eleven miles and a half of single track.

Q. How long have you been engaged in this business?

A. Ever since the machinery came for the road.

Q. How many years, about, is that?

A. It is almost five years.

Q. Have you had any experience on any other line?

A. No, sir.

Q. You may state whether or not you made an examination of one of these Pullman cars that are in controversy, in this city, for the purpose of looking at the brakes.

A. Yes, sir.

Q. Just explain to the court what was the trouble you found with them.

A. Why, all of the motion seemed to be lost in the springing of the parts. The brakes were so complicated that all the motion seemed to be lost.

Q. What did you find the result to be when you had the brakes set so that you could get the use of the brake to stop the car on a straight track when you came to a curve?

A. Well, the brake as it was adjusted on the car that I looked at, the brake-shoes were rather close to the wheel.

Q. What was the result when you got to a curve?

210 A. It tightened up; the lever pulled a great deal harder back on the quadrant than when it was standing on the straight track.

Q. When you had the brake so adjusted that it could go around the curve without the shoe binding on the wheel, what was the result of the use of the brake on the straight track?

A. I didn't see that tried.

Q. From what you saw, what would you say as to the ability of a person going to the house of a manufacturer and looking at one of these cars to tell whether those brakes would work properly on the grades and curves of the Twelfth-street line?

A. I couldn't do it myself; it is too complicated; I couldn't follow the motions.

Cross-examination.

By Mr. RUNNELLS:

Q. Mr. Chapman, you are master mechanic on the Ninth-street line?

A. Yes, sir.

Q. How long has that road been in operation?

A. They started in March, 1885, to run the cable, I think.

Q. There are some severe grades on that line, are there not?

A. Yes, sir.

Q. What kind of cars do you use—combination cars?

A. No, sir.

Q. Never have used combination cars?

A. No, sir.

Q. What is the width of your cars?

A. The width over the sills six feet one inch and a half.

Q. Do you know what the weight of your cars is?

211 A. No, sir; I don't know. We estimate a coach two tons and a grip three tons.

Q. You say your road has been in operation since 1885?

A. Yes, sir.

Q. You had a good deal of trouble with the opening of your line, had you not?

A. Yes, sir; we had considerable.

Q. Brakes not holding and cars going down the incline?

A. No, sir.

Q. Didn't you have a number of accidents arising in that way?

A. Yes, sir; we have had a few accidents.

Q. From that sort of cause?

A. I didn't understand what you attributed the cause to.

Q. Why, the brakes not holding the cars in going down the incline.

A. Yes, sir; I didn't understand whether you asked whether the brakes failed to hold the cars or whether the brakes were not in the proper way.

Q. My question was this, Mr. Chapman—as to whether or not you didn't have a number of accidents as the result of the brakes not holding the cars upon the incline at or near the time of the opening of your line?

A. We have had two accidents result from that; yes, sir.

Q. You had the same trouble from the cable breaking, too, did you not?

A. Yes, sir.

Redirect examination.

By Mr. HAGERMAN:

Q. Do you know what the difference in width between the
212 tracks is upon your line and the Twelfth-street line?

A. I don't know what the width is on the Twelfth.

Q. Do you know which is the wider?

A. I don't.

Q. What is the width of your line between the tracks?

A. Eight feet six.

Q. Between the two rails in the center?

A. It is four feet eight and a half.

Q. I mean between the two inside rails. In other words, what space is there between the tracks?

A. I will have to figure it. Our coach is four feet eight.

By Mr. RUNNELLS:

Q. That is, from the center of one track to the center of the other?

A. Yes, sir.

Witness excused.

DWIGHT BARNES, called on the part of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. HAGERMAN:

Q. What is your connection with the Metropolitan Street Railway Company?

A. Division superintendent of the Twelfth-street line.

Q. How long have you held that position?

A. Since the road started; a little over a year ago.

213 Q. You may state whether in June, 1888, out at the Twelfth-street power-house, you ever told anybody that the Pullman cars were for sale.

A. I did not.

Q. Did you ever hear any conversation of that kind?

A. No; I don't know that I ever did.

Q. Were you out there at the time these Pullman cars came and at the time they tried to use them?

A. Yes, sir.

Q. Do you remember when the east end of the line was opened so a car could go over it?

A. 22nd of March, I think; the latter part of March.

Q. What difficulty, if any, was found with the workings of the brake at that time?

A. Well, the first time that we found the brakes wouldn't hold was when we got to Troost avenue, and there it stopped and the car ran back; the brakes wouldn't hold it.

Q. State whether or not any person came here from the Pullman works to fix them.

A. Yes, sir; there was a representative of that company came here—a Mr. Twyman.

Q. Did he go over the car?

A. Yes, sir.

Q. What did he do?

A. He fixed it; made several alterations in it.

Q. When did he return home with reference to the time you opened your line, before or after this first trip?

A. Well, I don't just remember; I think he came there

214 twice or three times.

Q. What I want to know is whether he went home from the first trip after he fixed these cars and before you opened the line.

A. Yes, sir.

Q. When was it that the west end was ready and the line was opened?

A. The 10th of April.

Q. What trouble, if any, did you find with the brakes and the operation of the cars upon that line when the cars were taken out on the 10th of April?

A. We found considerable difficulty with them.

Q. Well, what difficulty, if any, upon the curves?

A. We found they bound very hard on the curves when they were adjusted so that they could run with safety upon the grades.

Q. What was the result when the brakes were adjusted so that they could go around a curve without the shoes binding?

A. The result was that you couldn't stop it to let passengers off, and on several times when we were on a grade.

Q. After the opening of that road on the 10th of April, you may state whether or not Mr. Twyman was back.

A. Yes, sir.

Q. How long did he stay there working at the cars?

A. He was four or five days at one time. He made a thorough overhaul of one car.

Q. Do you remember the number of that car?

A. Yes, sir; 317.

Q. After he finished that what was done with car 317?

A. We gave it a trial trip to ascertain if everything was all right.

Q. Did you come back, then, with it to the power-house?

A. Yes, sir.

215 Q. What was said by Mr. Twyman, if anything, to Mr. Lawless after that?

A. Mr. Twyman asked Mr. Lawless if he thought that would do—if that was satisfactory.

Q. What did Mr. Lawless say?

A. Mr. Lawless said he couldn't say until a short trial had been had with it.

Q. When Twyman went away, who, if anybody, came from Pullman's?

A. There was a man came from the Pullman works to continue the work.

Q. When he came just tell the court whether he came with typewritten instructions as to doing the work.

A. Well, he had written instructions.

Q. Did he go over the cars?

A. Yes, sir.

Q. What attempt was made to use them after he had gone over them?

A. We used them upon the road as he turned them out.

Q. What was the result after he got through?

A. They were not satisfactory by any means.

Q. What was the trouble?

A. The same trouble that we had before.

Q. I didn't understand you.

A. I say we had the same trouble with them that we had all the while.

Cross-examination.

By Mr. RUNNELLS:

Q. What is the distance, Mr. Barnes, from the middle line of one track to the middle line of the other at the narrowest place?

216 A. Four feet five inches, I think; five or six inches. You mean between the two tracks?

Q. You mean between the running rails?

A. Yes, sir.

Q. I asked for the middle line.

A. It is a little more than nine feet, two or three inches.

Q. Well, now, there are points where they come a little nearer than that, are there not?

A. Yes, sir.

Q. What is the distance between the rails at the place where they come nearest each other?

A. I don't know just what, but they are some three or four inches nearer.

Q. Fully that?

A. (No answer.)

Q. Where are the Laclede cars that were bought and used awhile upon your line?

A. They are stored at the Eighteenth-street power-house.

Q. Why was their use discontinued, Mr. Barnes?

A. Well, to have a uniform lot of cars.

Q. Did their weight have anything to do with the discontinuance of their use?

A. No, sir.

Q. It did not?

A. No, sir.

Q. Did their width have anything to do with their discontinuance?

A. No, sir; I don't know as it did, only we had the other cars and thought it better to have a uniform lot of cars.

217 Q. When you ordered the other cars you ordered narrower cars, did you?

A. Yes, sir.

Redirect examination.

By Mr. HAGERMAN:

Q. Mr. Barnes, you spoke of the tracks being nearer together at some places. State where those places are.

A. That is where we have another cable to cross.

Q. Where you cross another cable road?

A. Yes, sir; we have to make an offset to let go with the grip.

By Mr. RUNNELLS:

Q. Did you overhear a conversation, as I understand it, about the sale of those cars?

A. I did not.

Q. You never heard anything said about the sale of them?

A. Not in a business manner. I heard talk about the cars——

Q. When Mr. Hagerman asked you the question you said you didn't know as you had ever heard any conversation. What did

you mean by that if you never had heard any? Why did you answer that you didn't know that you had ever heard any?

A. Well, I never did hear any.

Witness excused.

218 LESTER E. SIMMONS, called on the part of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. HAGERMAN:

Q. What is your business, Mr. Simmons?

A. I am assistant division superintendent.

Q. Of what?

A. Twelfth-street cable line.

Q. What was your business at the time of the receipt of these Pullman cars and their attempted use upon that line?

A. I have been in the same business ever since the Twelfth-street road started.

Q. Do you remember when the east end of the line was in condition to take a car over it?

A. Yes, sir; I remember about the time.

Q. Well, about when was it?

A. Well, it was about the last of March.

Q. You don't remember the exact date?

A. No, sir.

Q. Well, was or was not a car taken over the line?

A. There was a car taken over it.

Q. And what was the result as to the working of the brakes?

A. Well, we got up—the first day we tried to take a car out over the line we got up as far as Troost avenue and there it failed to run across, and the brake was not sufficient to hold the car and it ran back, down grade, to the car-house.

Q. What did you do there?

A. We had to abandon the trip; didn't go any further that day.

219 Q. Well, now, shortly after that did any person come from the Pullman works and attempt to fix those cars; and, if so, who?

A. Mr. Twyman came there shortly after that.

Q. How long did he remain at work upon the cars?

A. I can't say; I think three or four days.

Q. Did he finish his work?

A. I don't think he did at that time.

Q. Well, when was it, now, that the west end of the line was ready and the road was opened?

A. On the 10th day of April.

Q. Well, upon that day what difficulty was found with the operation of these brakes?

A. Well, we found the brakes were not safe to use—that is, the cars were not safe to use on account of the brakes binding on the wheels.

Q. When would they bind upon the wheels?

A. In going around the curves.

Q. Suppose they were set so they would go around the curves without binding, what would be the result upon straight track?

A. They would be of no material use on a straight track; you couldn't stop them upon any grade at all.

Q. Now, describe a little about this Troost-avenue crossing and whatever difficulties you had in crossing that.

A. Well, the Troost-avenue crossing going east is up grade, and the gripman has to run as close to the — as he can in order to have the car run over, and he throws the grip just at the edge of Troost avenue and the car *car* crosses by its own momentum, and when the brakes were adjusted to do any good on a straight track the shoes would be rubbing almost all the time on the wheels, and that wouldn't allow the car to run over.

220 Q. Is that the place spoken of as the let-go?

A. Yes, sir.

Q. What does that indicate?

A. It is the crossing of another cable road where in this case the Metropolitan cable line has the under cable and we have to let go at the sheave, which is the wheel on this side of the crossing, and of course in passing over the other cable we have got to let go our cable in order to get over.

Q. How did these brakes look before the car was taken out as to being all right?

A. Well, so far as I am able to say they looked all right.

Q. After that 10th day of April when the cars were taken out you may state whether Mr. Twyman came back and *and* how long he remained, if so.

A. He was back there a short time after that—a week or so or two weeks after that—and stayed for, I should judge, about the same length of time—about two or three days.

Q. And did he work then on several cars or one?

A. He worked on one in particular, but supervised work on all.

Q. What car was that?

A. 317.

Q. Now, when he left who, if anybody, came here for the Pullman Company?

A. There was a man came—I don't know his name—a mechanic from the Pullman shops.

Q. What for?

A. He came, as I understood it, on Mr. Twyman's instructions to fix the cars.

Q. Well, did he attempt to do it?

A. Yes, sir; he went right to work as soon as he came or

221 the next day after.

Q. Well, what did you do with reference to this work?

A. As fast as he got a car fixed we run it out and gave him another to work on.

Q. What difficulty, if any, did you find with the brakes after this mechanic had fixed them?

A. I think for a time the brakes worked, perhaps, a little better than they did before, but they would not stay as he left them, but got back to the old thing again after running a trip or two.

Q. What do you mean by the old thing?

A. The rods seemed to spring and the lost motion in the rods would make it so that the brakes would have to be adjusted every trip or two.

Q. What difficulty did you still have after this fixing about passing around curves?

A. They bound on the curves the same as before when the brake was adjusted so as to be used on the straight track.

Q. What difficulty did you still have on the straight track when the brake was adjusted so as they would go around the curves without binding?

A. They would be no use to you on the straight track. They wasn't safe to run.

Q. Did that man remain here after the cars were taken off?

A. Yes, sir; I think for a day or two after. He worked right along, though, until the cars were taken off.

Witness excused.

222 WILLIAM BRINKMAN, called on the part of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. HAGERMAN:

Q. Mr. Brinkman, do you remember these Pullman cars?

A. Yes, sir.

Q. What connection, if any, did you have with the Metropolitan Street Railway Company at the time those combination Pullman cars were there?

A. I come there to learn gripping at the time the road opened.

Q. You speak of learning as gripman. What do you mean by learning?

A. Well, there is a good deal in learning how to grip. I don't exactly know how to explain it.

Q. What I mean is, would you go out under the charge of an experienced gripman to work the train?

A. Yes, sir; you have to learn so many days under another gripman before you turn in as an employé of the company.

Q. Now, when you were operating the Pullman cars, what trouble, if any, did you have with the brakes?

A. Well, I found when the brakes were adjusted so as to hold the train on a straight track they bound on the curves.

Q. What difficulty, if any, did you have as to the cars jumping the track at curves?

A. Well, after I was turned in as running a car by myself I had a car jump the track on the east loop twice, I think it was—once or twice.

Q. You may state whether or not the wheels were binding
223 at that time.

A. Yes, sir; the wheels were binding and sliding.

Q. When the brakes were adjusted so that there would be no binding in going around curves, what was the result on the straight track?

A. You couldn't hold your train; you couldn't control your train.

Cross-examination.

By Mr. RUNNELLS:

Q. What has been your business before you began to learn gripping?

A. Conductor on a horse-car. I drove horse-cars.

Q. Had you had any experience with machinery?

A. No, sir.

Q. When did you begin to work for the Metropolitan Company?

A. Oh, something over two years ago.

Q. Who inspects the cars on the Metropolitan lines, or is there any inspection?

A. There is men inspects the car every night, but who they are I never paid no attention to them.

Q. You don't know anything about that?

A. No, sir; I ran the cars on the road, but I don't know anything about the inspection.

Q. You say men inspect them every night?

A. Well, whenever anything is the matter with our train we report it to the office and it is fixed.

Q. That is all the knowledge you have of the inspection?

A. Yes, sir.

Q. Who sees to tightening up bolts and adjusting the brakes?

A. Well, the men's names I couldn't say.

224 Q. The gripmen never do that?

A. No, sir; not unless on the road. If a bolt or anything happens to come loose we tighten it up.

Q. Did you have anything to do with adjusting the brakes upon the Pullman cars?

A. I adjusted the brakes at Troost avenue once. We have to cross the avenue without the rope, and the brakes stuck and stopped the car, and we tried to push it over, but we couldn't do it, and I got under the car and turned the turn-buckle so as to loosen the brake and then we pushed it over and got over all right.

Q. Then it went all right?

A. We got over all right, but when I went to hold it with the brake I had to turn the turn-buckle up again before I could hold the train.

By Mr. HAGERMAN:

Q. Did you run the Laclede combination cars on that road any?

A. Not to amount to anything; no, sir. I may have a few times, but not to amount to anything.

Witness excused.

It is admitted by plaintiff's counsel that the following witnesses would, if put upon the stand, testify to the same effect as the last witness: C. Hoolihan, J. D. Fitch, Al. Perine, F. M. Bartow, Robert Bitner, W. S. Wallace, W. P. Gleason, William Weston, Henry Long, J. G. White, J. W. Vogel, C. P. Cline.

Rebuttal:

Counsel for plaintiff reads the answer of Mr. Brown to Mr. Morse concerning the rejection of the cars, dated May 17th, 1888, marked "Exhibit 97."

Adjourned until tomorrow morning.

225 APRIL 26TH, 1889—a. m.

NICHOLAS OVERTOOM, called on the part of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Mr. LATHROP:

Q. Where do you reside?

A. I reside at Kensington, Illinois.

Q. Near Pullman?

A. Yes, sir.

Q. What is your business?

A. My business is assistant truck foreman.

Q. For what company?

A. For the Pullman Company.

Q. How long have you been employed by that company in that capacity?

A. About two years and a half in that capacity.

Q. Were you with the company before that in any capacity?

A. Yes, sir.

Q. In what capacity?

A. Truck hand.

Q. How long have you been engaged in doing mechanical work about cars?

A. About seven years.

Q. And prior to that time were you engaged as a mechanic generally?

A. No, sir; I was switching tender before that.

Q. So that for the past seven years you have been engaged in mechanical work about cars?

226 A. Yes, sir.

Q. Do you know these cars ordered by the Metropolitan Company from the Pullman Company?

A. Yes, sir.

Q. What did you have to do with them, if anything; and, if so, at what time and under what circumstances?

A. We had charge of building those trucks.

Q. In your department in Chicago?

A. In my department in the Pullman works.

Q. After the cars were shipped to Kansas City did you have any further connection with them; and, if so, what was it and when?

A. I was sent here by the Pullman Company to make a few alterations in the brake-lever.

Q. What time was that?

A. That was the latter part of April, 1888.

Q. What time did you arrive at Kansas City? Give the day, as near as you can, and state how long you remained here.

A. I arrived at Kansas City on the 26th of April.

Q. 1888?

A. 1888.

Q. How long did you remain?

A. I remained until the 12th of May the same year.

Q. What did you say was the cause of your coming here?

A. To make some alterations in the brake connections and levers.

Q. Now, please state when you came, where you went, and what you did.

A. After I came here I went to the city office and enquired for Mr. Lawless and he wasn't up there, and they directed me to their power-house on Twelfth street, and I went there, and the first person I met was Mr. Barnes.

227 Q. The gentleman who was on the stand yesterday; the assistant superintendent?

A. Yes, sir; and I handed him my letter of recommendation, and he took me to Mr. Lawless. Mr. Lawless said he was glad to see me. He said I was the party he wanted to see, provided I could make those changes in the levers, but he was afraid I couldn't make those changes or make them right, or anybody else.

Q. What did you do?

A. He give me two men to help me make those changes. The same day I started to work, and I started on one car and the next day completed that car.

Q. Now at that time were some of these cars running on the line regularly and receiving and handling passengers?

A. Yes, sir; they were.

Q. About how many of them?

A. I think there was seventeen or eighteen of these cars on the line at that time.

Q. Being actually used from day to day?

A. Yes, sir; they were.

Q. And the west end of their line west of the power-house over into Kansas was running at that time complete?

A. They were running complete.

Q. Now, you say you finished one of the cars the next day after you got here?

A. Yes, sir.

Q. Was that car turned out onto the road for service?

A. Yes, sir; it was.

Q. Did you make the first trip around with it?

A. Yes, sir; I did.

Q. Who was on the car with you?

228 A. Mr. Barnes.

Q. How did it happen, if you know, that Mr. Lawless did not accompany you?

A. I asked him whether he was to go along with this trip and he said no.

Q. Who did he say would go with you?

A. He said Mr. Barnes was to go.

Q. Did Mr. Barnes go with you?

A. Yes, sir; he did.

Q. What was the result of your trip with that car along the line?

A. The result was all that I could expect.

Q. Just state whether it held the car down the steep grades and whether it operated all right upon the curves.

A. So far as I could see, it operated perfectly everywhere. The brake held the car in going up and down grades and in every way operated perfectly.

Q. Did you have any conversation with Mr. Barnes as to whether it worked all right or not?

A. After we came back I asked his opinion about this car, and he wouldn't give any at that time.

Q. Wouldn't give any at all?

A. No, sir.

Q. You may state whether or not, while on the trip and while you and Mr. Barnes were on the car and in his presence—what, if anything, the gripman of the company in charge of the car said about the working of the brake.

Counsel for defendant object to the question as incompetent, irrelevant, and immaterial.

By Mr. LATHROP: The question is what the gripman who was actually handling the brake said in the presence of the di-
229 vision superintendent as to whether the brake was working satisfactorily or not.

By Mr. PRATT: Perhaps I ought to have stated that we would not object to it if they will identify this gripman as one of the gripmen whose testimony was taken yesterday. We object to it without designating who the gripman was.

Objection overruled and exception taken by defendant.

A. When we got on the car, me and Mr. Barnes, the gripman asked us what this all meant, and I told him we were to try those brakes, and he wanted to know what was the matter with those brakes, and I told him, as I understood it, there was something wrong about them and I had made some changes on them, and he said they didn't want no better brakes to operate; that they were as good as any he had ever seen.

Q. After you concluded this trial trip what was said, if anything, between you and the gripman and Barnes about the matter?

A. I don't remember no conversation, only that Mr. Barnes wouldn't express no opinion either way, and in asking the gripman again he said it was a good brake all around.

Q. You may tell the court, Mr. Overton, whether this car that

you tested at that time and was completed the day after you got here, on or about the 27th of April, continued in use by the Metropolitan Company in the handling of its business from that time down to the time you left here, on the 12th of May.

A. As near as I can remember, it was.

Q. Do you remember what the number of the car was—the first one that you fixed?

A. Yes, sir.

230 Q. What number was it?

A. Car No. 321.

Q. Now, then, state what you did, Mr. Overton, with regard to the other cars in regard to fixing them the same way that you had this car 321.

A. Do you mean especially?

Q. What did you do with them in regard to putting them in the same shape as car 321?

A. I raised the center plates and the side bearings one inch.

Q. That was on all the cars?

A. On all of them; yes, sir; and one inch under the spring plate so as to raise the car up two inches.

Q. A little louder, please.

A. One inch under the spring plank, and took off the turn-buckles under the trucks and substituted an eye-buckle through the bottom of the channel bar, with a hole drilled and tapped in so as to take the connection rod, the connection-rod jog being taken off and a thread put on and this screwed in there so there could be no monkey work after they were once fixed unless you take out the pin that held the brake-lever and turned back or forth, as the case would be, to shorten or lengthen the rod.

Q. Proceed with what else you did.

A. Well, I took off all the hooks and connections and substituted jaws in place of pins.

By the COURT:

Q. Can you make a diagram of them?

A. The truck brake; yes, sir.

Q. (Looking at drawing.) This is the standard that you call the brake-lever?

231 A. Yes, sir; this here is an upright lever fastened on here with a jog. This connection fastens on this lever here with a pin to the jaws that way. The jaw that I made there has a turn-buckle in here, and to shorten or lengthen this connection here you have to take this pin out and turn this connection to the right to shorten and to the left to lengthen it.

By Mr. LATHROP:

Q. Had you completed your description of the changes which you made in the adjustment of this brake?

A. I had made all the changes that was possible for me to make.

Q. Have you told everything here on the stand that you did in regard to readjusting this brake?

A. I think that was about all the changes that I made that I can remember.

Q. Now, did you proceed from day to day in applying this changes in the same manner to the other cars that you had to car 321?

A. Yes, sir.

Q. How many of the cars did you actually readjust in the way in which you have described it in car 321?

A. I think I adjusted them all, but there was two or three cars that couldn't be finished for the reason that there was some brake-shoes broken.

Q. Now, just explain in regard to those two or three cars what had happened to them in being operated, if anything, by the company around the line.

A. There was one car that had the center casting broken in it.

By Mr. PLATT:

Q. What was that?

232 A. The center casting; there was another car that had the brake-beam and brake-gearing torn out, and there was another car that had the pedestal or oil-box spring broke.

Q. Pedestal or spring box broken?

A. Oil-box spring.

Q. How were those breakages caused, Mr. Overton?

A. Well, as I understood it at the time, the casting was broken by running the grip into a sheave on the road.

Q. By running a grip into a sheave?

A. Yes, sir.

Q. In the operation of the car by the gripman on the line?

A. Yes, sir; and the brake-beam and connections were broken, I learned afterwards, by running over a large stone or into a large stone.

Q. As fast as you adjusted these brakes were the cars put into operation on the line of the company?

A. Yes, sir.

Q. Where is the power-house located with reference to the line?

A. Right on the street.

Q. And you were at work in and by the power-house on these cars?

By Mr. PRATT: Ask him where he was at work.

By Mr. LATHROP: Those are formal matters; I supposed it would save time.

Q. Where were you at work on these cars?

A. In the power-house.

Q. Where was that situated?

A. That was situated on the line on Twelfth street.

Q. As fast as the brakes of these cars were adjusted by you what was done with the cars, if anything, in regard to them being

233 put in the operation or handling the business of the company by the company?

A. I don't understand you.

Q. As fast as you had readjusted these brakes on these cars what was done with the cars, if anything, in regard to being put in service by the company on the line in handling its business?

A. As fast as I completed those cars they were taken and put on the line and used.

Q. About how rapidly could you make these readjustments? How long did it take you to readjust a car, for instance, with the help that you had?

A. Two, sometimes three, a day.

Q. Two or three a day?

A. Some days I couldn't do but one; some days I would do probably four.

Q. During the time that you were here, from the 26th of April to the 12th of May, as fast as these cars were readjusted, what difficulties, if any, were brought to your attention in the way of actual operation of the cars and the brakes in doing the business of the company on the Twelfth-street line?

A. I don't quite understand you.

Q. Did they use the cars after you got them fixed? Did they put the cars in use and use them right straight along day after day while you were here?

A. Yes, sir; they did.

Q. Did you make any other trial trips around with Mr. Barnes or with any one in the employ of the company after you had gone around with the car No. 321?

A. No, sir; I didn't with any of the employés, but I rode
234 over the line frequently.

Q. How many times?

A. Oh, perhaps three or four times, at least.

Q. How did the brakes operate during the trips that you rode around the line?

A. So far as I could see, they operated perfectly.

Q. Any cars run off the track?

A. No, sir.

Q. Any difficulty in crossing other cable lines?

A. No, sir.

Q. Any difficulty in holding the cars on the incline?

A. No, sir.

Q. When you made these rides did you ride on the Pullman cars?

A. I think they had some others. I always rode on the Pullman cars—that is, if I had a chance.

Q. How many trips can you say you made on the Pullman cars or on the line during the time that you were here?

A. There was only one trip made around the line—around the whole course.

Q. How many times did you go on the Pullman cars over the incline, around the curves and grades of the loop in West Kansas?

A. I think I went about six or eight times over the incline, up and down.

Q. On any of these trips what difficulty, if any, was experienced with the brakes that was called to your attention or observation?

A. I haven't seen any at all.

Q. For what purpose did you make these trips?

A. To see how the cars would work.

Q. During the time that you were here, Mr. Overton, and at work in the Twelfth-street power-house what difficulties, if any, did
235 you notice, or what changes, if any, were made that you observed in regard to the grip used by the Twelfth-street line by the Metropolitan Company in operating these cars?

A. Well, they had a great deal; seemed to have a great deal of trouble with their grips.

Q. What did you observe in regard to it?

A. They were continually breaking them and seemed to wear out their brakes' shoes very quickly. One time, I think, they were really waiting for grips to run their cars with.

Q. Waiting for grips? What do you mean?

A. They hadn't grips enough to use to run their cars.

Q. What had become of those they had had at the time they opened?

A. I think they were making some changes on them.

Q. You may state whether or not you noticed any—and, if so, how many—grips about this power-house that had been laid aside from breakages or being twisted or any other defect?

A. I couldn't do that.

Q. What do you know about any changes being made in the grip and a new grip being inserted in the cars or provision being made for it during the time you were there with them?

A. I couldn't say much about the grip part. I had nothing to do with that. I simply attended to the brake-work. What alterations they made I couldn't specify.

Q. But you did notice that they were having a great deal of trouble with their grips breaking, and so forth?

A. Yes, sir.

Q. You heard Mr. Lawles, the superintendent, testify yesterday, didn't you, Mr. Overton?

A. Yes, sir.

236 Q. Do you remember the occasion when Mr. Lawless put his knife-blade in between the brake-shoe and the wheel during the time that you were here?

A. Yes, sir; I do.

Q. You were present at that time, were you?

A. Yes, sir; I was present.

Q. Where was the car at the time he applied his knife?

A. The car was in the power-house, ready to go out.

Q. Just state what occurred at that time.

A. It was, I think, the first car I had got ready.

Q. Car 321?

A. Yes, sir; car 321; and I told Mr. Lawless the car was ready and asked him if he was going along, and he looked around the car and observed this brake-shoe against the wheel and said that he

didn't want this brake-shoe as close against the wheel, and he took out his knife and tried to get it in between the brake-shoe and the wheel, although it seemed to me it could have been inserted there very easy. I looked at the brake-shoe and found that the brake-spring at this corner was very weak.

Q. Caused by what?

A. Caused by not being properly tempered, I think. It didn't have the same temperature as the other three brakes, so that the other brake here gave the force and shoved this around—shoved the shoe against the wheel. As I observed later, there was plenty of room in between the wheel and the brake-shoe on the other wheels.

Q. That is, the other wheels of this same car?

A. Of this same car; yes, sir. So I removed this brake-spring from the wheel and give it a little more set and adjusted it and it was all right.

237 Q. Was this done while Mr. Lawless remained around?

A. I won't say that he was present while this was going on, but it was at that time that I done that that I wanted to try this car.

Q. How long was it before you took out this brake-spring and had it reset, as you call it, or retempered and put back before you took the car out and ran it around?

A. Oh, it may have been a half an hour; perhaps an hour.

Q. Now, was that the same car and the same occasion upon which you and Mr. Barnes made this trial trip around the line?

A. Yes, sir.

Q. Mr. Overton, do you know about the circumstance of the brake-handle being bent up at Chicago by request of Mr. Lawless, when he made his inspection up there in December, 1887?

Mr. PRATT: They went all over that. There isn't the slightest question between Mr. Lawless' testimony and their own in regard to that.

Mr. LATHROP: It is simply introducing another matter. It is just preliminary.

Objection overruled and exception taken.

Q. You know about there being bent up there, do you?

A. I know that these levers were bent.

Q. Now, I will get you to state whether or not, after you came here to fix the brakes, you observed whether those levers had been straightened after they got here and an additional handle put on; and, if so, by whom?

A. When I came here I found all those levers straightened.

Q. What was done, if anything, after they were straightened in regard to enabling the gripman to reach this brake-lever without stepping forward?

238 A. There was an additional connection put on over the floor onto this upright lever going down into the center to connect with the bottom connection—that is, with the body con-

nection—and in that way throw this lever back probably eighteen inches and enable them to reach it.

Q. Do you know what effect the original bending of the lever had upon the operation of the brake in regard to bringing the brake-shoes against the wheels?

A. Well, it would lose its power considerably.

Q. Why?

A. Because on a bent lever, the lever being bent, say, half way from the point of fulcrum to the handle, you wouldn't have the pulling. You would pull outwards, perhaps, or pull against the lever instead of pulling towards you, so that you would lose a great deal of power that way; whereas if it was straight you have a perfect leverage.

Q. I will get you to state to the court whether while you were here the use of these cars on the Twelfth-street line was suddenly discontinued. If so, state when it was and what the cause of the discontinuance of the use of the cars was as reported to you by any officer of the Metropolitan Company.

By Mr. PRATT: Let him state it.

By the COURT: By what officer?

By Mr. LATHROP: Mr. Barnes, the assistant superintendent.

A. On the morning of the 11th of May, I think, the cars were kept in the barn. I asked Mr. Barnes the cause of it, and he said the cars were continually breaking the cable.

By Mr. PRATT: Continually what?

A. Breaking the cable; and I asked him the cause of that,
239 and he said he thought the cars were too heavy.

Q. Up to that time I will ask you to state to the court whether any complaint had been made to you in regard to the operation of the brakes on any of the cars which you had readjusted.

A. I think there was one or two instances where they called my attention to a couple of cars that I had running on the road, and in looking them over again I found that the upper turn-buckle had been tampered with—that is, not properly adjusted. It either was turned up too tight—in one case held the brake-shoes too close to the wheel and in the other case it was altogether too loose; so that by adjusting these turn-buckles I got those cars in running condition.

Q. That occurred in reference to how many of them?

A. I think it was one or two.

Q. How about those besides these three cars that you spoke about having something broken about them? How about the other twenty-two or the other twenty aside from these two?

A. I don't remember of hearing any complaints.

Q. You may state if up to the time, the 11th of May, when these cars were discontinued, these other cars were in daily operation on the line in the handling of its business.

A. Yes, sir; they were.

Cross-examination.

By Mr. PRATT:

Q. Who sent you to Kansas City?
A. The Pullman Palace Car Company.
Q. What officer?
A. Well, I was called up by Mr. Twyman.
240 Q. Did Mr. Twyman telegraph you from Kansas City?
A. No, sir; he didn't.
Q. Did he direct you from Chicago? Was he at Chicago when he told you to come here?
A. Yes, sir; he was.
Q. Did he or any other officer of the company give you written or printed instructions what to do?
A. Mr. Twyman did.
Q. Mr. Twyman did give you written instructions?
A. Printed.
Q. Have you got those instructions?
A. I haven't them with me.
Q. Where are they?
A. I couldn't say at present.
Q. Were they printed out upon a typewriter?
A. Yes, sir.
Q. Were you directed to follow those instructions?
A. Yes, sir.
Q. Did you follow them?
A. Yes, sir; I did.
Q. Implicitly? You followed them exactly, did you?
A. Yes, sir; as far as the instructions went I followed them.
Q. Now, then, you came here with specific instructions from Mr. Twyman as to what you should do?
A. Yes, sir.
Q. And, as I understood you to say on your direct examination, you made all the changes in those brakes that was possible for you to make?
A. Yes, sir; I did.
Q. So that the fact is that after you had made those
241 changes, if those brakes did not work, then you couldn't have made them work?
A. Yes, sir.
Q. Now, you spoke of there being a good many broken grips and the company not having sufficient to operate the cars and all that. Do you pretend to say that a defective grip, if you please, or a grip that is liable to break—not operate well—would affect the brake upon the car?
A. I do not, sir.
Q. Then the fact as to whether they had good grips or defective grips wouldn't affect the brake one way or the other?
A. Well, it wouldn't as far as the holding of the cars is concerned.
Q. That is what I mean: that is what the brakes are for. Now,

I think you said that you found when you came here that these brake-levers were straight?

A. Yes, sir.

Q. They had been bent at Chicago?

A. Yes, sir.

Q. Who straightened those brake-levers?

A. I don't know.

Q. Don't you know the fact that Mr. Twyman did it after he came here?

A. I don't.

Q. Were you ever told so?

A. No, sir; I was not.

Q. Did you make any inquiries about who did it?

A. No, sir; I didn't.

Q. Still you found them changed?

242 A. Yes, sir; I found them straight.

Q. And you never made any inquiries as to who did it or by whose directions it was done?

A. I didn't know at the time. I made no inquiries, for the simple reason I thought perhaps it was done at Chicago.

Q. Didn't you think, too, it might have been done by Mr. Twyman after they got here?

A. I wasn't told anything about it.

Q. Those printed instructions given to you didn't say anything about that one way or the other?

A. No, sir.

Q. And you came here just to follow those instructions?

A. I came here to correct those brakes according to the instructions.

Q. What did you say your position was with the Pullman Company?

A. Assistant truck foreman.

Q. How long have you been assistant truck foreman?

A. Two years and a half.

Q. What are the duties of assistant truck foreman?

A. To superintend the building of the various trucks and repairs that are going on at the works.

Q. Repairs to the trucks?

A. Repairs to the trucks.

Q. Does that include the making of the brakes?

A. Yes, sir; that is, putting them on.

Q. Do you have anything to do with constructing the brakes?

A. No, sir.

Q. That is out of your department?

A. That is out of my department.

Q. Then your duties are simply to attend to the construc-

243 tion of the trucks and repairs of the trucks at the shops?

A. Yes, sir.

Q. Where were you working in that power-house on Twelfth street?

A. I was working in about the central part of the building.

Q. About the central part of the building?
A. Yes, sir; towards one side—towards the alley side.
Q. How far back from the front of the building?
A. Well, I should think it would be about a hundred feet.
Q. A hundred feet back from the front of the building?
A. Yes, sir.
Q. The cable tracks are in the street in front of the building?
A. Yes, sir.
Q. And you are about a hundred feet back from the front of the building?
A. Yes, sir.
Q. Were you at work most of the time?
A. Yes, sir; I was.
Q. And from the time that you came here, on the 26th or 27th of April, up to the time you left you were most of the time continually at work there, were you?
A. I was, with the exception of morning, noon, and evening.
Q. And from the place you were at work you couldn't see the cars in operation on the road?
A. No, sir; but I frequently went out to the front and see those cars when they would leave the shops—that I had finished—and always watched them.
Q. But most of the time you were at this business of repairing at a distance of about a hundred feet?
A. Well, the farthest point, I think, was a hundred feet;
244 probably not as far; one part of it was, perhaps, seventy-five feet.
Q. Now, you say on the morning of the 11th of May these cars were taken off?
A. They were not put on; they were simply kept in on the 11th.
Q. They were taken off the road, weren't they? They were not operated after the 10th, were they?
A. No, sir.
Q. You said, I believe, in your direct examination that on the morning of the 11th you had a conversation with Barnes, the assistant superintendent, and that he told you that they were continually breaking the cable?
A. Yes, sir.
Q. And that he said he thought the cars were too heavy?
A. Yes, sir.
Q. Where was that conversation had?
A. I think it was in front of the building.
Q. Who were present?
A. I couldn't say about that.
Q. Was anybody present besides yourselves, beside yourself and Mr. Barnes?
A. I don't remember.
Q. You don't remember that there was any one there but yourself and Mr. Barnes?
A. No, sir.

Q. How long were you and Mr. Barnes engaged in that conversation?

A. I won't say; probably two minutes.

Q. And you don't know of anybody else being there at the time?

A. No, sir.

Q. Who was this gripman that you said told you that he
245 didn't know but what the brakes worked all right or he thought that the brakes worked all right on the car?

A. I don't know the man's name.

Q. Did you see him here yesterday?

A. No, sir.

Q. Did you see this gripman who was here yesterday?

A. Yes, sir.

Q. He wasn't one of them?

A. No, sir.

Q. You spoke about three of the cars that you didn't finish or that you didn't change on account of their being in bad condition. You spoke of something being broken about them?

A. Yes, sir.

Q. You spoke of their being broken—one, I believe, by running over a stone, and I don't remember how you said the other was broken.

A. That is what I learned afterwards.

Q. Who told you?

A. I think it was some of the men working in the shop.

Q. In the presence of Mr. Barnes?

A. No, sir; they wasn't.

Q. All that information about how they were broken came from some of the men in the shops?

A. Yes, sir.

Counsel for defendant moves to exclude all the testimony of this witness as to the cause of the breaking of those three cars referred to as incompetent, irrelevant, and immaterial. Motion sustained.

By Mr. LATHROP:

Q. This power-house that you speak of, I will get you to
246 state whether or not it was a place where the cars were run in at night after the cable had stopped operating and run out in the morning again.

By Mr. PRATT: O, yes; that is understood.

A. Yes, sir.

Witness excused.

GEORGE F. BROWN, called on the part of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. LATHROP:

Q. What is your business?

A. I am general manager of the Pullman Company.

Q. How long have you served in that capacity?

A. Well, in that particular capacity for about five years—four or five.

Q. You were acting general manager of the company, then, at the time that the contract was made for the building of these cars for the Metropolitan Company in controversy?

A. I was.

Q. You knew about this clause in the contract in regard to inspection and acceptance at Pullman?

A. I did.

Q. You may please state, Mr. Brown, what the object is in having that sort of a clause in the contract for the manufacture of cars.

By Mr. PRATT: I object to that; I expect the contract will explain itself.

By the COURT: I am inclined to think the objection is well taken.

247 Counsel for plaintiff offer to prove by this witness that that clause in the contract for the manufacture of cars is universally exacted by the Pullman Company in the manufacture of all of its cars; that they would not accept the contract unless that condition were inserted, and that the object and purpose of it is that persons may come from the buyer and look over the cars, and giving a thorough and critical inspection of them to ascertain whether they comply with the contract, in order that if any defects are pointed out they may be remedied at the car shops, where they have their men and all the facilities for completing the contract.

Counsel for defendant object to the offer of plaintiff; which objection is sustained, and to which ruling of the court plaintiff excepts.

Q. Mr. Brown, do you know about the coming of Mr. Lawless, the superintendent of the defendant company, to Chicago and thence to Pullman for the purpose of inspecting these cars under the contract with the Metropolitan Company?

A. I do.

Q. You were not present, I believe, at the actual inspection that was made?

A. I was not.

Q. Did you have any conversation at all with Mr. Lawless after he had been to Pullman and inspected the cars and returned to Chicago?

A. I don't recall that he did afterwards.

Q. Some certificates of inspection and receipts have been introduced in evidence; you are familiar with them; you know what they are?

248 A. I do.

Q. You may tell the court, if you know, why those inspection certificates were not signed by Mr. Lawless at the time he was at Pullman and made his actual inspection.

Counsel for defendant object as calling for conclusion and opinion of the witness and as incompetent.

By Mr. PRATT: There hasn't been the slightest proof that those certificates were ever offered to Mr. Lawless to be signed there, and this witness states he had no conversation with Mr. Lawless there at all.

By Mr. LATHROP: I do not claim, if your honor please, that those certificates were tendered Mr. Lawless, but they have brought the certificates in here and exhibited them as though the inspection was made here or to be made here instead of up there at the works. Now, I think it is perfectly competent to show why it was that the certificates of inspection were not signed there and why they were afterwards sent out here to be signed.

Mr. PRATT: That is the very thing we object to.

By Judge BREWER: The question is why they were not signed there. If there is any special reason why they were not, I think the testimony is competent.

A. I don't know of my own knowledge why the inspection certificates were not signed when he was there. I have to make that answer if I am excluded from stating what I was officially advised. If I may state what I was officially advised——

By Mr. PRATT: No, sir; not at all. You have answered the question.

Q. You may state, Mr. Brown, why it was that those inspec-
249 tion certificates and receipts were afterwards sent here to Mr. Lawless for signature.

Counsel for defendant object to the question as incompetent, irrelevant, and immaterial, because the certificates referred to were enclosed in letters which explain why they were sent; that they were sent here for him to sign and return, and they have been introduced with the letters which accompanied them. Objection sustained. Counsel for plaintiff excepts.

Q. You may state, if you know, Mr. Brown, whether at the time Mr. Lawless was at Pullman for the purpose of inspecting these cars they were already to be loaded on the cars for shipment and to be receipted for.

A. They were not.

Q. What connection did that fact have, if any, with the not exacting the signature to the inspection certificates by Mr. Lawless at the time.

Objected to as incompetent, irrelevant, and immaterial.

By Mr. LATHROP: It is the same question which was admitted before in regard to what was done up there.

By the COURT: But he answered he did not know except what was reported to him.

Objection sustained. Counsel for plaintiff except.

Q. I will ask you, Mr. Brown—you need not answer it until after it has been passed upon—whether, in the course of your business in the manufacture of cars, it is customary, when cars are actually

ready for shipment at the time the inspector of the buyer is at the works and inspects the cars, to exact at that time an inspection certificate.

Objected to as incompetent, irrelevant, and immaterial.
250 Objection overruled. Counsel for defendant except.

A. It is customary.

Q. I will ask you further, Mr. Brown, whether it is customary for your company in manufacturing cars, when they are not entirely ready for shipment at the time the inspector of the buyer is at Pullman for the purpose of inspection, to permit the actual signing of the inspection certificate and receipt for the cars to be deferred until the cars are actually shipped to the buyer and then executed for the purpose of completing your records.

Objected to as incompetent, irrelevant, and immaterial. Objection overruled. Defendant excepts.

A. That is frequently done.

Q. I will call your attention to the language of the certificate on your printed forms of inspectors' certificates: "I hereby certify that I have this day inspected and received from Pullman's Palace Car Company, Pullman car works, Pullman, Ill., for account of Metropolitan Street R'y Co.," &c., up to "for account of" being in print, and ask you to state, if the custom is as you have stated in answer to the last question, why it is that the actual signing of this certificate is so deferred until the actual delivery of the cars.

Objected to because "it goes right around to the original question that was ruled out." Objection sustained. Plaintiff excepts.

Q. I will ask you whether the sending of such certificates to the buyer at the place of business of the buyer for signature after the actual shipment of the cars contemplated on the part of the Pullman Company an additional inspection after the delivery of the cars at the place of residence or business of the buyer.

Objected to as incompetent, irrelevant, and immaterial.
251 By Mr. LATHROP: I think it is competent for the witness to say whether or not he sent that inspection certificate for the purpose of having an additional inspection made or for the purpose of having his record completed. If, as a matter of law, his sending it did actually have the effect of giving the other side a chance to reinspect that is a question of law, but if the purpose of the sender was not to have an additional inspection, but to have the record completed, that is a question of fact.

By Mr. PRATT: We attempted to have Colonel Morse show the reasons for writing to Mr. Brown a clause of a certain letter. That evidence was objected to on the ground that the letter would show for itself.

By the COURT: Of course, what the parties say or do is competent testimony, and the court from that will determine what are the liabilities assumed, but when you go beyond that and say that this or that is the motive for doing a certain thing it is not competent.

The other side may not know anything about that. He cannot predicate his action upon the fact that the other party had this or that reason for this or that act.

By Mr. LATHROP: That is a fact, but wouldn't it be competent? Take that question that Mr. Runnells objected to and afterwards withdrew his objection: "What was your purpose, Mr. Lawless, in going to Pullman?" Isn't that a competent question? And if he did not go there for the purpose of inspecting the cars wouldn't it have been competent for him to have said that he went there for some other purpose, and that this examination was a sort of
252 incidental to his trip? And if that is true wouldn't it be competent for the man who came out here bearing this inspection certificate to take up to Mr. Lawless' office and get his formal signature to it for the purpose of completing the company's records to testify to that?

Objection sustained. Counsel for plaintiff except.

Q. Mr. Brown, can you tell in a very general way without consuming much time how extensively your company is engaged in the manufacture of various kinds of cars and how many are manufactured of each kind during the course of the year?

A. Yes, sir.

By the COURT: We have had that once.

Q. Then we will pass from that. I will ask you whether it is customary in your business, even in cases where cars have been actually received and paid for and some trouble is ascertained in regard to their operation, to send people from your works to examine and look after and repair the difficulty.

Objected to as incompetent, irrelevant, and immaterial. It don't make any difference whether it is customary or not customary.

By the COURT: We do not regard it as very material, but the testimony may become competent.

Counsel for defendant excepts.

A. We are in the habit of doing that whenever the occasion arises.

By the COURT:

Q. I suppose in the spirit of business——

A. In the spirit of due regard for the prestige of the company and for our moral obligation to make anything right that is wrong without questioning the technicalities of it.

Witness excused.

253 H. H. SESSIONS recalled on the part of the plaintiff.

Direct examination by Mr. LATHROP:

Q. Mr. Sessions, do you remember, after the work of the construction of these cars under this contract was begun, about the changes

in the dimensions that were sent to your company by the engineers of the Metropolitan?

A. I remember that some changes were sent—requests for some changes.

Q. Do you remember about the changes in the width of the cars?

A. I remember that we had to *made* them some wider than was originally intended.

Q. In connection with making that change, I will get you to state whether or not you had gone forward to any extent with the original specifications in regard to getting out any portion of the timbers, floor sills, and so forth.

A. Yes, sir; I had the floor framing all up for the twenty-five cars of narrow width.

Q. Well, did the changes in the specifications sent in by the engineers necessitate any change in those floor sills or any loss of the use of any part of those sills that you had made?

A. An entire loss of all the cross-timbers.

Q. Why so?

A. They were too short for the new requirements.

By Mr. HAGERMAN: We do not understand the purpose of this.

By Mr. LATHROP: The purpose of it is simply to show the control of the defendant's engineers here over the manufacture of the cars and the dimensions and everything.

254 By Mr. HAGERMAN: That is shown by the correspondence very fully.

By Mr. LATHROP: It is also shown that they accom-odated themselves to that and lost the sills, for which we do not make any claim, but offer it to show that the whole control of these matters was left to the Metropolitan Company.

By the COURT: That is just as well proven by showing that they did defer as by showing that it cost a good deal to do it.

Counsel for plaintiff except.

Q. Since you have been here, Mr. Sessions, I will ask you if you have made an actual measurement of the distances between the cable tracks of the Twelfth-street line.

A. Yes, sir; I have.

Q. Now, state to the court the results of those measurements and how close the rails come together of the double track—the inside rails—at any of the points where you measured.

A. I found the slot rails were nine feet and five inches apart—that is, from center to center of the tracks. That would make the inner rails from their inner faces about four feet and eight inches apart.

Q. That is, how far were their outer faces? Do you mean the inner faces of the two rails opposite each other?

A. The flange faces of the rails.

Q. What is the nearest point between the two—that is, the distance between the edges of the two inside rails—the intervening space between the two inside rails?

A. That would be about four inches less.

Q. The width of these cars as built was eight feet three
255 inches over all?

A. Yes, sir.

Q. Will you tell the court on that width of track and that width of space between the two inner rails what the distance would be between the outside of those cars in passing each other—that is, where they come nearest together in passing? In passing the inside of the cars would come how near together?

A. On a straight line they would be about four inches apart and on a curve from six to eight inches, as is shown by the diagram which I made this morning.

Q. Have you that in your pocket?

—. No, sir; it is on the back of this blue print. These lines here (referring to the plat) represent the centers of the tracks. Those lines are the slot rails, and these other two papers show the size of the cars. This is $\frac{3}{4}$ inch to the foot scale, and this shows the curve to the offset at Twelfth and Main streets. The car approaching the curve here, assuming that it is central, would leave this point here six inches. It figures six and a half inches. On a straight line it figures fourteen inches without any swaying of the car or side motion, and when you get down to the curve there is practically six inches when the cars are running without a swaying or oscil-ating motion.

Q. I will ask you, Mr. Sessions, to state what it would have cost to have applied the ordinary brake to these cars.

By Mr. HAGERMAN: We object to that for the same reasons we gave yesterday, and the objection was sustained.

By Mr. LATHROP: Now, I offer to show by this witness that any of the ordinary brakes in use upon cable cars and such as were in use upon the Laclede Company's cars upon that line could
256 have been applied to these cars at a cost of from seventy-five to one hundred dollars per car.

Objection sustained. Plaintiff excepts.

Plaintiff offers plat as Exhibit 99.

And thereupon plaintiff rested in rebuttal.

And thereupon defendant introduced the following evidence in surrebuttal:

LESTER E. SIMMONS, recalled on the part of the defendant, testifies as follows:

Direct examination by Mr. HAGERMAN:

Q. Mr. Simmons, Mr. Overtoom, the man who testified here a few minutes ago, was the Pullman mechanic you testified about in your former examination as the one who worked on these cars, was he?

A. Yes, sir; he was.

Q. He said something about not knowing that after these brakes on

these cars were fixed by him the brakes still failed to operate. What have you got to say upon that subject?

By Mr. LATHROP: They went into all that with this man when he was upon the stand before, and he detailed everything, I believe, in regard to his knowledge about the matter of the trouble with the brakes.

By the COURT: Mr. Overtoom testified, I believe, that no complaints were made to him. Objection overruled.

Plaintiff excepts.

Q. Just state the facts in relation to that.

257 A. I think he could have known that we were having trouble right along with them.

Q. That is not the question. I want to know if you told him anything, and, if not, whether it was a matter of general notoriety and generally talked about while he was there present.

Objected to as incompetent, irrelevant, and immaterial.

By the COURT: The question is whether complaints were made by him, not what was talked around about the car-barns.

By Mr. HAGERMAN: What I want to prove, both by Mr. Simmons and Mr. Barnes, in this connection is that no special complaint was made to this gentleman, Overtoom, for the simple reason that he was right there in the car-house, so that there was no necessity for making any complaint. It was a matter of general notoriety.

Objection sustained. Defendant excepts.

By Mr. HAGERMAN: I want to prove the same fact by Mr. Barnes, and I presume the same objection will be applicable; but I want to ask Mr. Barnes one or two other questions.

Witness excused.

DWIGHT BARNES, recalled on the part of defendant, testifies as follows:

Direct examination by Mr. HAGERMAN:

Q. Mr. Barnes, did you hear Mr. Overtoom's testimony

258 about taking out car 321 after he had fixed it?

A. I did; yes, sir.

Q. Do you remember who the gripman was that went with that trip?

A. No, sir; I can't recall just now.

Q. Did you hear Mr. Overtoom's testimony as to what the gripman said there in your presence as to the car working all right and there hadn't been any trouble with the brakes of the Pullman car?

A. Yes, sir.

Q. You may state whether or not you heard any such conversation.

A. I did not.

Q. Did you hear Mr. Overtoom's testimony that upon the 11th of

May after these cars were taken off as to your telling him that the cars were taken off because they were heavy?

A. Yes, sir.

Q. Now you may state what in that conversation you said to him.

A. That was the day after they were taken off?

Q. Yes.

A. I was back in the rear part of the power-house that morning with Mr. ——, this gentleman, I forget his name. He says, "I see you have laid the cars by," and I says, "Yes." And he wanted to know why, and I says, "For the reason that pulling those cars around the curves with the wheels sliding is a detriment to our cable," as it had broke once that day or the day before.

Cross-examination.

By Mr. LATHROP:

Q. Did he say anything about the cars being heavy?

A. Yes, sir; to pull around in that way, sliding the cars around with that weight.

259 Q. Were they too heavy for successful operation upon that Twelfth-street line?

A. I don't know as they would have been if the brakes were properly adjusted.

Q. You did lay off the Laclede cars?

A. We laid them off later on.

Q. Were they too heavy?

A. Well, they are heavy cars.

Q. The cars you ordered for your new equipment were the grip car and coach?

A. Yes, sir.

Q. Your new equipment consisted of grip cars and coaches after this first order of thirty cars?

A. Yes, sir.

Q. And today the only cars you are running on that line are grip cars and coaches?

A. Yes, sir.

Q. And the combination cars of the Laclede Company which worked all right were stored out in your Eighteenth-street power-house?

A. Yes, sir.

Q. And the Pullman cars were some six hundred pounds heavier than the Laclede cars, weren't they?

A. That is what I understand.

Q. So you did say to Overtoom as one of the reasons for laying them off that they were heavy?

A. I said sliding cars of that weight around those curves was what was breaking our cable.

Q. Did you have any trouble with your grips?

A. Yes, some.

Q. Good many of the grips were twisted and bent and
260 broken, weren't they?

A. Yes, sir.

Q. And you made a change in the grip, didn't you—put in a new grip?

A. No, sir.

Q. Use the same form of grip now, do you, that you did at the time you opened?

A. Same form; yes, sir.

Q. Didn't change the style of the grip at all?

A. No; no more than to strengthen it.

Q. You made it heavier, didn't you?

A. Yes, sir.

Q. The grips you first used were too light and got bent and broken, didn't they?

A. Some of them did; yes, sir.

Q. A good many of them, didn't they, Mr. Barnes?

A. I can't say a good many.

Q. Didn't you have a great pile of broken and twisted grips at the time Mr. Overtoom was here, lying in the car-house?

A. We had some grips in there for repairs; yes, sir.

Witness excused.

By Mr. PRATT: We shall want to offer testimony by Mr. Knight as to the width between the tracks of the Ninth-street line, which runs more cars than any other line in the city, and, with the understanding that that can be done when the witness returns, we are ready to proceed with the argument.

By Mr. RUNNELLS: We shall not object to the time it — offered, but we do object to any such evidence as incompetent, irrele-
261 vant, and immaterial. One act of negligence won't excuse another.

By the COURT: Well, you may call the witness when he comes and we will pass upon the competency then.

During the opening argument for plaintiff by Mr. Lathrop the witness, W. B. Knight, returned, whereupon the argument was suspended and the following testimony introduced on behalf of defendant:

W. B. KNIGHT, recalled on the part of defendant, testifies as follows:

Direct examination by Mr. PRATT:

Q. Mr. Knight, have you got a tracing in here showing the width of our tracks and cars and the width between the cars coming along the adjacent track?

A. Yes, sir; that is a tracing of the Fifth-street line, and the track centers are the same distance apart as on the Twelfth-street line. The cars on the Twelfth-street line were wider, which reduces

that distance there of twenty-two inches, as shown there on this Fifth-street line, to fifteen inches between the bodies of the cars.

Q. Then, as I understand you, the distance between those Pullman cars on our Twelfth-street line would be fifteen inches?

A. Yes, sir; between the bodies of the cars; between the nearest points on the cars—steps or running boards—is thirteen inches.

Q. Between the nearest points—that is, between the out-
262 side of the steps and running boards—is thirteen inches?

A. Yes, sir.

Q. But between the bodies it is fifteen inches?

A. Yes, sir.

Q. You are accurate, then, as to this?

A. Yes, sir.

Q. You know the exact distance, do you?

A. Yes, sir; there is no question about that. Our tracks are nine feet four inches between centers and the cars, according to the specifications are eight feet three inches, leaving thirteen inches between the cars—that is, measured between the nearest points of the two cars passing and not between the bodies of the cars.

Q. You are familiar with the Ninth-street cable line in this city?

A. Yes, sir.

Q. How many cars do they run daily in comparison with the other lines in the city over their main lines?

A. They run a great many cars. I don't just know how many in number.

Q. They run three or four times as many as any other road in the city here over the main line, do they not?

A. Well, I should think they did; yes, sir; with the possible exception of the Walnut-street branch of the Fifteenth-street line. There is a car about every three minutes on the Ninth-street line.

Q. Do you know about their carrying passengers?

A. Yes; they carry a very great number of passengers.

Q. Do you know the distance between the tracks, and also the widths of the car, so as to be able to tell us what would be the distance between the nearest points on their cars when they are
263 on opposite tracks?

Objected to as incompetent, irrelevant, and immaterial.

By Mr. PRATT: What we want to show is this: They have introduced their own witness, Mr. Session, to show that the distance between our cars was some fourteen inches. I do not know exactly what their purpose is. It certainly could not be for the purpose of showing negligence on our part in running that class of car. It would be very proper in an action for personal injury.

But the testimony is in, and now I want to show by this witness that on a line which operates three or four times the number of cars—the oldest line in the city—they operate cars on tracks where the distance is considerably less than it was on our Twelfth-street line with those wide cars. So that whatever inference they may claim or may make from the fact of those cars being so wide, we certainly ought to have the benefit of the fact that on this other

line which runs three or four times as many cars they have been and are today using cars much nearer together than these Pullman cars were.

By Mr. RUNNELLS: I have only to say in reply that it does not seem to me that whatever may have been the motive for rejecting these cars that that motive could either be sustained or refuted by proving what has been done by some other company. Certainly the proof of the fact that the Ninth-street line runs its cars as near or nearer than the wide cars bought from our company by the Metropolitan Company would not tend to establish the fact that that was wise or safe or proper. It would not establish the
264 custom among street railways to do that kind of thing.

By Mr. PRATT: I suppose that they propose to claim that the reason why we rejected these cars was not on account of the insufficient and defective brakes, as we claim, but because the cars were so wide and came so near together that we considered it dangerous to use them. I imagine that is precisely what they are going to claim.

By Mr. RUNNELLS: Let me ask Mr. Pratt, suppose that were the motive—and it does great credit to the gentleman's judgment that he should have divined it—suppose that were the motive, we might turn around and claim that the experience of the Ninth-street line had demonstrated the impropriety of running these cars so near together.

By Mr. PRATT: Very well.

By Mr. RUNNELLS: I can't see any proper ground upon which such evidence can find its place in the case. If it went to establish a general custom of street railway companies to run their cars so near together, then I grant there might be some ground for it.

Objection sustained. Defendant excepts.

By Mr. RUNNELLS:

Q. You testified as to how near the cars ran upon your line—fourteen inches or something, I think. Now, wouldn't it be true, Mr. Knight, that, in rounding a curve, if one car were—I don't know as I shall get the mechanical term—upon the point of the curve and another car were approaching and just passing, that the corner of the approaching car would come nearer the body of the other car than that?

A. It would be perfectly true if the tracks were the same distance apart on the curves, but as a matter of fact they are
265 spread so as to allow for that.

By Mr. PRATT:

Q. So that in going around a curve they are the same distance apart then as they would be on a straight track?

A. Yes, sir.

By Mr. RUNNELLS:

Q. That was the nearest point, the point at which you testified they would be fourteen inches apart?

Q. Yes, sir.

Witness excused.

And the exhibits referred to and offered in evidence, as referred to in the foregoing testimony, were as follows:

266 EXHIBIT "1."

Agreement.

CHICAGO, ILLS., *June 14th*, 1887.

Metropolitan Street Railway Co., Kansas City, Mo.

GENTLEMEN: Pullman's Palace Car Company will build for the Metropolitan Street Railway Company twenty-five (25) combination closed and open cable cars, as per general specifications attached hereto and made a part of this agreement, and deliver the same f. o. b. Pullman Junction of Kensington, Ills., on or before October 10th, 1887, delays by fires, strikes, and unavoidable hindrances excepted, for the sum of two thousand ($2,000.00) dollars each.

Terms, cash on deliveries.

Cars to be inspected and accepted at our works.

Your written acceptance hereof will constitute a contract mutually binding upon both companies.

PULLMAN'S PALACE CAR COMPANY,
By GEO. F. BROWN, *General Manager.*

Accepted June 27, '87.
METROPOLITAN STREET RAILWAY COMPANY,
By KNIGHT & BONTECOU, *Chief Engineers.*

Pullman's Palace Car Company, Pullman Car Works.

PULLMAN, ILL., *June* 14, 1887.

General Specifications

For twenty-five (25) combination cars, lot —, plan 510, for account of Metropolitan Street R'y Co.

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Ground plan	Length, 34' 9" over all; width, 6' 6" or more over sills.
Framing	Height from top of sill to under plate, —.
Flooring	Pullman st'd.
Style of outside	Number of windows each side, 8.
Roof	" " " end, 2.
Hood	

Window sash, cherry.
Glass, D. T. French. Size—lower, —; upper, —.
Glass in clear story, embossed. Size, —.
" in doors, D. T. French. Size—lower, —; upper, —.

Blinds, cherry frames, basswood slats.
Ceiling, mahogany; decoration, —.
Inside finish, same as 16′ cars recently built.
Seat ends, —; seating capacity, —.
Seats and backs, same as 16′ cars recently built.
" " covering, Wilton plush carpet.
Trimmings, bronze. Basket racks, —.
Lamps, centre: 2 in closed & 1 in open part.
" bracket, none.
Water cooler, "
Heater, "
Saloons, "
Locks, "
Body colors, same as 16′ cars recently built.
Decoration, suitable design.
Lettering, —.
Numbers, from 200 to 224, inclusive.
Names, none.
268 Platforms, 3′ 9″, per sketch, with one gate on left-hand side.
Height from top of rail to centre of drawbar, —.
Colors, same as 16′ cars recently built.
Drawer springs, —; buffer springs, —.
Brakes to be operated by gripman with lever, both trucks.
Brake-power, —.
Sand-boxes to be applied on front truck at centre.
Trucks, Pullman st'd for cable cars.
Gauge, 4′ 8½″.
Wheel base of truck—rear truck, 4′ 0″; front truck, short as possible to admit grip.
Colors, —.
Wheels, Fulton foundry.
Axles, 3½″ iron.
Springs, bolster, —; pilot on front truck.
" equalizer, Vose.
Pedestals, Bemis; wire guards on side.
Oil-boxes, "
Oil-box lids, "
Brake-shoes, Congdon flange.
Journal bearings, Bemis.

Remarks.—Extra brakes on rear truck operated by brake-mast, with wheel at rear-end platform.

Exhibit "2."

(Blank certificates of inspection and acceptance identified, but not introduced at present.)

269 Exhibits 3 & 4.

(See under date of December 5th, 1887.)

EXHIBIT 5.

KANSAS CITY, MO., *May 13th*, 1887.

Mr. Chas. Pullman, Pullman Palace Car Co., Pullman, Ill.

DEAR SIR: We write to say that we are now ready to talk cars for our Wyandotte and 12th street lines, and should be glad to have you call on us at your convenience.

Yours truly, KNIGHT & BONTECOU,
Chief Engineers.

EXHIBIT "6."

CHICAGO, *June 21st*, 1887.

Chas. F. Morse, Esq., president Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: I beg to enclose herewith contract, with specifications attached, executed by me in duplicate, for the building of twenty-five (25) combination closed and open street cars for your Co. Kindly sign and return to me one copy of contract for our files.

You will notice in the specifications that the space for the lettering has been left blank, and I would be glad if you would indicate on the specifications returned the lettering you desire applied
270 to the cars.

Very respectfully, GEO. W. BROWN,
General Manager.

2 enclosures.

EXHIBIT "7."

Copy.

KANSAS CITY, MO., *June 27th*, 1887.

The Pullman Palace Car Co., G. F. Brown, gen'l man'g'r, Chicago, Ills.

DEAR SIR: Your letter of the 21st, enclosing contracts and specifications in duplicate for the 25 combination cars for our 12th-street line, addressed to our President Morse, has been referred to us for attention in his absence, and we enclose you with this one copy duly executed by us on behalf of the company.

Will you kindly advise about when we may expect to get the general plans which Mr. Pullman, when here, promised to let us have?

Yours truly,
(S'g'd) KNIGHT & BONTECOU,
Chief Eng'rs.

EXHIBIT "8."

CHICAGO, 27*th June*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'y Co., Kansas City, Mo.

GENTLEMEN: Our mechanical department has been looking into the practicability of putting cross-seats in the closed portion
271 of the cable cars we are building for your company, and as the result they recommend the use of longitudinal seats. They find that even with a car made of the extreme width of 8 ft. 3 in., as has been suggested, and allowing 18 — for the aisle, it would only give a clear seating space for each person of about 16 in., which is entirely too close for comfort, especially in a climate as warm as yours.

As time is quite an important matter, kindly wire me upon receipt of this whether we shall apply the longitudinal seats or cross-seats.

Very respectfully,

GEO. F. BROWN,
General Manager.

8.

272 EXHIBIT "9."

CHICAGO, 30*th June*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street Railway Co., Kansas City, Mo.

GENTLEMEN: I am in receipt of your favor of the 27th inst. enclosing copy of contract, with specifications, duly signed by you, for the building of 25 combination cable cars for your company.

In regard to the general plans which you say Mr. Pullman promised you, would state that our draughting department has been pressed for a great many drawings and we have not as yet been able to get plans of cars completed. As soon as finished will send same to you.

Very respectfully,

GEO. F. BROWN,
Gen'l Manager.

EXHIBIT "10."

KANSAS CITY, MO., *June 30th*, 1887.

The Pullman Palace Car Co., Geo. F. Brown, gen'l man'g'r, Chicago, Ills.

DEAR SIR: We have your favor of the 27th and matter referred to has our attention.

We very much dislike to change the general design for seats in our 12th-street cars and urge that you will give the matter further and more careful attention. We should have at least 34 inches clear seat width and we hope that you may be able without increas-

ing the extreme width of the car over 8 feet 3 inches to give us the desired seat room.

Yours truly,

(S'g'd) KNIGHT & BONTECOU,
Chief Engineers.

EXHIBIT "11."

KANSAS CITY, Mo., *July 2d*, 1887.

The Pullman Palace Car Co., G. F. Brown, gen'l ma'g'r, Chicago, Ills.

DEAR SIR: We have to acknowledge receipt of your favor of the 30th acknowledging receipt of contract for cars and note that you say with reference to the plans. We did not expect to get the completed plans now, but would like to have as soon as possible a sketch or unfinished drawing showing general dimensions, car seats, &c.

Yours truly,

(S'g'd) KNIGHT & BONTECOU,
Chief Eng'rs.

273 EXHIBIT "12."

CHICAGO, *6th July*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'w'y Co., Kansas City, Mo.

GENTLEMEN: I am in receipt of your favor of the 7th inst. in further reference to the plans of the combination cable cars we are building for your company and I regret to say that at present we will be unable to furnish you even a sketch or an unfinished drawing of these cars, as we have been so pressed in our draughting department that we have been unable to prepare anything but merely the shop drawings. We are, however, at present working on the plans of the cars and will furnish you with same at the earliest possible moment.

Very respectfully, GEO. W. BROWN,
Gen'l Manager.

EXHIBIT "13."

CHICAGO, *July 13th*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR:: Your favor of the 30th ultimo in regard to cross-seats in combination cable cars was duly received and answer to same would have been made before this but for the fact that our people desired to look thoroughly into the matter and see what could be done in the way of meeting your wishes.

Our sup't now reports that he, with our mechanical engineer, has carefully gone into the matter and states that we can

apply 34″ seats, as desired by you, in the cars, leaving an aisle of 18″ in the center, but that in doing so it will necessitate making the posts straighter, in order to give sufficient space at the bottom of the car. This change in the post will, as, no doubt, you will agree with me, detract from the appearance of the exterior of the car, and I hardly think it would be satisfactory to your company. However, being anxious to meet your pleasure in this matter, we will alter the style of the post and put in sixteen (16) cross-seats of the above dimensions if you so desire. This will make the car, as stated before, 8′ 3″ wide over all.

The putting in of cross-seats will increase the figures formerly given you $155.00 per car for rattan-covered seats and $195.00 per car if seats are covered with plush. These figures are based on seats similar to standard coach seats, but with fixed backs.

As time is quite an important matter, I would be glad of an early reply as to what you desire us to do in the premises.

Very respectfully, GEO. F. BROWN,
Gen'l Manager.

274 EXHIBIT "14."

KANSAS CITY, MO., *July 18th*, 1887.

The Pullman Palace Car Co., G. F. Brown, gen'l man'g'r, Chicago, Ills.

DEAR SIR: We have to acknowledge receipt of your favor of the 13th, delivered up personally by Mr. Twyman.

We have gone over the dimensions with him carefully, and he left on Saturday with a memoranda covering the principal points, which has our approval. We shall be glad if you will let us have as soon as practicable copies of your drawings as fast as made.

We consider the matter of outside appearance a rather secondary consideration to the comfort and convenience of passengers in the car and are willing to sacrifice something to outside effect if necessary to secure the latter result.

We are somewhat surprised to note what you say with reference to additional cost for the cross seats, as we never contemplated any other kind of seat, and it was clearly understood by your Mr. Chas. Pullman when here that this was what was desired, being exactly similar to what he had figured on for the Grand Avenue Co.'s cars in this respect. We think if you will refer to him he will confirm our statement in this respect.

Yours truly,
(S'g'd) KNIGHT & BONTECOU,
Chief Eng'rs.

275 *Specification.*

KANSAS CITY, MO., *July 16th*, 1887.

Combination cars for Metropolitan Street Railway Co.
Length to be 33 feet over all.
Width, 8 ft. 3 in. over all.

Width of floor frame, 7 ft. 3 in.
Height from top of track to top of floor, 2 ft. 3½ in.
Distance between centres of trucks, 20 feet 0 inches.
Wheel base of truck, 4 feet 8 inches.
Distance from front of car to centre of forward truck, 4 ft. 9 in.
Length of closed part of car, 20 ft. inside.
Length of open portion, 8 ft. 9 in.
Rear platform, 3 ft. 7 in.
Size of wheels, 22 in. diameter.
16 cross-seats, to be fixed as decided.
Approved July 16th, 1887.

(S'g'd) KNIGHT & BONTECOU, *Engineers.*

276

EXHIBIT "15."

CHICAGO, 19*th July*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'y Co., Kansas City.

DEAR SIRS: Referring to the 25 open and closed street cars we are building for your company, I would be glad if you would advise me as soon as possible the lettering you desired applied, as our people are anxious to have this information in order to get up their stencils, &c. I would beg further to inquire if you desire any special design or pattern of exterior decoration used on the cars or if we shall use our own judgment in this regard.

Very respectfully, GEO. F. BROWN,
General Manager.

EXHIBIT "16."

Combination Cars.

PULLMAN, ILLS., *July 20th*, 1887.

Mess. Knight & Bontecou, engineers Metropolitan Street R'y Co.

DEAR SIRS: In arranging the forward truck to carry the grip, the question arises as to how far it will be necessary to provide for curving while the grip is in position, and I assume that before the cars are turned into the car-house the grip will be removed, or in other words it will not be requisite to provide for traversing any curve of less than, say, forty ft. radius while the grip is *in situ*.

Your early confirmation of this will much oblige.

Faithfully yours, A. TWYMAN, *Engineer.*

Such details of your grip as may be now finished would be valuable to me in order to judge of the clearances required, as we have no space to spare.

A. T.

EXHIBIT "17."

CHICAGO, *22d July*, 1887.

Messrs. Knight & Bonticue, chief eng'rs, Metropolitan Street R'y, Kansas City.

GENTLEMEN: Your favor of the 18th inst. received and noted. We think we now fully understand just what your requirements are in all particulars, and the cars will be built in accordance with the memoranda which Mr. Twyman brought back with him.

I especially note your remarks in regard to the understanding with Mr. Charles L. Pullman that the 25 combination cars would be provided with cross-seats, and that they were included in
277 the price that he quoted.

This understanding is different from what I was told by Mr. Pullman on his return, and as he is now absent on a sick leave and will not return for several days I shall be unable to make a definite reply upon this point until I can see him. I may add, however, that we shall proceed to put in cross-seats, as you direct, leaving the question of price to be settled hereafter.

Very respectfully, GEO. E. F. BROWN,
Gen'l Manager.

Of course, we shall carry out in good faith whatever Mr. Pullman has agreed to.

EXHIBIT "18."

KANSAS CITY, MO., *July 22nd*, 1887.

Pullman Palace Car Co., G. F. Brown, gen'l man'g'r, Chicago, Ill.

DEAR SIR: Replying to your favor of the 19th with reference to lettering on our cars for 12th-street line, we beg to advise you as follows:

12th street, Union depot, stock yards, & Armourdale.

On main panel: Number of car.

On bottom panel: Metropolitan Street Railway Co.

On front dash: On one side "Armourdale," and on the other side "Union depot."

On the rear dash: Put the number of the car again.

We leave the matter of special design and exterior decoration to your judgment and taste in this matter. Of course, you will *use* the same general body colors that *was* used on our 5th-street cars.

With reference to the construction of car, our president is desirous of retaining the special feature of low window sills, say not over 13 to 15 inches above the level of the seat, and we think it would be preferable to make the window in two parts, if necessary, leaving the upper part fixed and making the lower and larger part only movable and to raise instead of lower. The only thing then to be accommodated below the window sill will be the sun blind. This, we think, would be better than to have one big window, which

would bring the top of the window frame when down about 19 inches above the level of the seat, as indicated by Mr. Twyman when here. The leaving out of this big window will give us the additional advantage of providing a space along the side of the car near the top for the main lettering, as above indicated, which, on the other plan, would have to be, we presume, accommodated by a special sign-board, supported on brackets on the roof of the car at the eaves. It also seems to us that we might get an additional advantage either in reducing the extreme width of the car, which it would be advisable, if practicable, to make only 8 feet over all, or, by retaining the extreme width of 8 feet 3 inches, gives us an additional width inside over what we could get with the big window. Practically there seems to be some difficulty in making these large windows work without sticking.

We consider this matter of such importance that we shall be glad to visit your shops when your drawings are a little further complete if it seems desirable to do so.

Yours truly,

(S'g'd)) KNIGHT & BONTECOU,
Chief Eng'rs.

278 EXHIBIT "19."

KANSAS CITY, MO., *July 23rd*, 1887.

Pullman's Palace Car Co., A. Twyman, engineer, Chicago, Ills.

DEAR SIR: Replying to your favor of the 20th inst., we have to say that the grip will not be removed before the cars are run into the house and it will be necessary to provide for running on a curve with a radius of 30 feet while the grip is in position. We can see no difficulty in doing this, except that it may be necessary to bring the points of curve on the slot 2 feet 4 inches back from point of curve on the track, though we do not believe that in practice this would be necessary. We have not yet completed drawings for our grip, but are at work on them constantly, and as soon as we have them completed will forward them to you at once.

Very truly,

(S'g'd) KNIGHT & BONTECOU,
Chief Engineers.

Dictated Wynne.

EXHIBIT "20."

CHICAGO, *25th July*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'y Co., Kansas City, Mo.

GENTLEMEN: I have your favor of the 22d inst. giving instructions about the lettering of your combination cars for your 12th-street line. I also note your remarks with regard to the construction of the windows and will write to you further on this point after I have consulted with our people at Pullman.

Very respectfully. GEO. F. BROWN,
Gen'l Manager.

EXHIBIT "21."

KANSAS CITY, MO., *July 27th*, 1887.

The Pullman Palace Car Co., A. Twyman, engineer, Chicago, Ills.

DEAR SIR: We should be glad to have you keep us advised of your progress in the drawings for our cars for 12th-street line.

We think it may be advisable for us to visit your works in order to be sure that everything is all right.

Please let us have rough tracings, if convenient, as you proceed with the work.

Yours truly,

(S'g'd) KNIGHT & BONTECOU,
Chief Engineers.

279 EXHIBIT "22."

KANSAS CITY, MO., *Aug. 5th*, 1888.

Pullman's Palace Car Co., Mr. A. Twyman, engineer, Chicago, Ill.

DEAR SIR: As per your request, we send you herewith enclosed a blue print of our grip, giving essential sizes and dimensions, which we think will give you all the information necessary to enable you to adapt it to your car. Should you wish further information please advise us at once.

Yours truly,

(S'g'd) KNIGHT & BONTECOU,
Chief Eng'rs.

Dictated Wynne.

EXHIBIT "23."

CHICAGO, ILL., *Aug. 8th*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street Railway Co., Kansas City.

DEAR SIR: Your favor of the 5th inst., addressed to Mr. Twyman, our engineer, enclosing blue print of your grip device, giving the sizes and dimensions, &c., required by us, as per our recent letter, has been received by me.

Very respectfully,

(S'g'd) GEO. F. BROWN,
General Manager.

S.

EXHIBIT "24."

KANSAS CITY, MO., *Aug. 10th*, 1887.

Pullman's Palace Car Co., A. Twyman, engineer, Chicago, Ill.

DEAR SIR: We beg to advise you that our Mr. Knight expects to be in Chicago Monday, the 15th inst., and hopes to be able to see

you with reference to details of working drawings for our 12th-street cars.

Yours truly,

(S'g'd) KNIGHT & BONTECOU,
Chief Eng'rs.

EXHIBIT "25."

PULLMAN, ILL., *Aug. 12th*, 1887.

Chief Eng'r Knight, Met. St. R'y Co., Kansas City:

Please wire me what train you will arrive Chicago Monday.

C. L. PULLMAN.

280 EXHIBIT "26."

PULLMAN, ILL., *Aug. 26th*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street Railway Co., Kansas City, Mo.

DEAR SIRS: I send you by this mail blue print of the floor frame of your combination cars. You will observe that a variation of 1½" has been made in the position of the trucks. This was found necessary in order to obtain certain constructional advantages, and I apprehend will not be objected to.

Kindly acknowledge receipt and say if approved.

Faithfully yours,

(S'g'd) A. TWYMAN, *Engineer.*

EXHIBIT "27."

KANSAS CITY, MO., *Aug. 31st*, 1887.

Pullman's Palace Car Co., A. Twyman, engineer, Pullman, Ills.

DEAR SIR: Your favor of the 26th duly received, together with blue print of floor frame for our combination cars, which has our approval. We suppose that in this plan you have provided for reducing the extreme width of car to eight feet, as specially desired.

We desire to call your attention to the following points in connection with our cars:

We are anxious to have a sectional drawing of the car showing posts, steps, &c., as soon as possible.

Please make the arm at the aisle end of seats as low as possible, and do not let it extend beyond the center of the seat.

We would like to have your opinion as to the desirability or otherwise of putting safety or stay chains from the body of the car to the trucks, especially the forward truck.

We spoke to Mr. Pullman, when here recently, with reference to the design and location of sand-boxes, and should be glad to have you communicate just where you propose to place them in the cars. We also would like to have a low arm rest or ledge at the inside of

seat next to the post if it can be conveniently arranged without reducing the width of the seat.

Yours truly,

(S'g'd) KNIGHT & BONTECOU,
Chief Eng'rs.

EXHIBIT "28."

CHICAGO, ILL., *Aug. 31st*, 1887.

Knight & Bontecou, Metropolitan St. R. R., K. C.:

My letter Thursday last should be advised shipping directions your cars at once so as to order flat cars, otherwise they will be delayed. Answer.

GEO. F. BROWN.

281 EXHIBIT "29."

CHICAGO, 2 *September*, 1887.

Messrs. Knight & Bontecou, chief engineer Metropolitan Street R'y Co., Kansas City.

GENTLEMEN: I am in receipt of your favor of the 31st ulto., requesting that your ten cars be forwarded via the C. & A. R. R., from whom you have obtained a rate of $65.00 per car, unless we are able to get a lower rate.

Being anxious to assist you all possible, I made inquiry of the Rock Island road and found the rate to be the same via that line, and I have, therefore, directed that the cars be shipped via the Chicago and Alton road.

Very respectfully, GEO. F. BROWN,
General Manager.

8.

"EXHIBIT 30."

PULLMAN, ILLS., *Sept. 6th*, 1887.

Messrs. Knight & Bontecou, chief engineer Metropolitan Street Railway Co., Kansas City, Mo.

GENTLEMEN: In reply to your favor of 31st of August, the floor framing of the combination cars which I have forwarded to you is designed to meet the various points agreed upon between us at Kansas City and embodied in the notes dated the 16th of July, of which you have a copy. It was then understood that the car was to be 8' 3" wide over all; you will remember that even with this width we are barely able to give you the width which you require inside.

The drawing of the cross-section will be completed in a day or two and a copy sent to you.

Your request respecting the seat-arm has our attention.

With respect to the desirability of applying check-chains to the truck, their ostensible purpose is to keep the trucks in a line within the limits of their length. I am not sure but that their application

might be advantageous. You shall hear further from us upon this subject, as also upon the design and location of the sand-boxes which you desire shall be applied.

As to the arm-rest or ledge upon the side of the car, we are doubtful if it will please you, as it will most certainly reduce the capacity of the seat just so far as it projects. You will see, finally, if you desire it, when the cross-section is forwarded to you.

Yours truly,

(S'g'd) A. TWYMAN, *Engineer.*

282 EXHIBIT "31."

KANSAS CITY, MO., *Sept. 9th*, 1887.

Pullman Palace Car Co., A. Twyman, engineer, Pullman, Ills.

DEAR SIR: We have to acknowledge receipt of your favor of 6th, contents of which has our attention.

We are apprehensive that our cars may not be ready in time for our road, and we are also desirous that when completed they should contain every desirable and necessary feature, and in order to insure this result we think it will be advisable to visit your works again, and you may expect our Mr. Knight to arrive in Chicago Monday afternoon. Will you please advise Mr. C. L. Pullman to this effect.

Yours truly, KNIGHT & BONTECOU,
Chief Eng'rs.

EXHIBIT "32."

PULLMAN, ILLS., *Sept. 13th*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'y, Kansas City, Mo.

GENTLEMEN: I can appreciate your wish that the combination cars we are building for you should possess every desirable and necessary feature that can be combined in their construction, and can assure you that we are sparing no effort to ensure the desired result.

With this I send you a general view of the car, and in this connection please refer to my letter of the 6th inst. and notify us if there are any points that appear to call for further legislation.

Faithfully yours, A. TWYMAN, *Engineer.*

EXHIBIT "33."

KANSAS CITY, MO., *Sept. 15th*, 1887.

Pullman Palace Car Co., Mr. A. Twyman, engineer, Pullman, Ills.

DEAR SIR: Your favor of the 13th inclosing blue print of general view of car is received, and we call your attention to the following points:

The width of the platform should be 3 ft. 9 inches clear inside,

and we desire to have this ample width, even if the total length over all is increased slightly.

We think it would be desirable to have a draw-bar at the rear end to provide for contemplated emergencies or accident to car on the line.

283 We hope you will make the brake-beams unusually heavy and strong.

In the matter of life guards or fenders, we think the projection at the front, as shown, is more than desirable, and perhaps more than may be necessary. You do not show any fender on the front end of rear truck, nor any alongside of trucks, which we suppose you intend to put on but purposely omitted from the drawing.

We should like to know proposed height of first and second steps and seat. It appears to us from the scale that the first step is too high from the ground.

Please advise us what provision you make for head-light at front dash.

We shall be ready to operate our cars promptly on the 15th of October, and hope that you will use your best endeavors to expedite the construction.

Please advise us what progress you are making with the trucks. We should like to inspect this work as soon as you have got a truck in shape.

With reference to the stay chains or links on trucks, we are inclined to think, on further reflection, that these should certainly be put on.

Yours truly, KNIGHT & BONTECOU,
Chief Eng'rs.

P. S.—The general plan is quite satisfactory in other respects. Don't think we want any arm-rests to seats.

K. & B.

EXHIBIT "34."

PULLMAN, ILL., 5 *October*, 1887.

Mess. Knight & Bontecou, chief engineers M. S. Ry.

DEAR SIRS: I returned from the West a few days since, and find that in my absence a letter has been received from you. It has been handed to our sup't of construction, Mr. Sessions, who will give attention to the various points named.

Faithfully yours, A. TWYMAN, *Engineer.*

EXHIBIT "35."

KANSAS CITY, MO., *Oct. 8th*, 1887.

Pullman Palace Car Co., A. Twyman, engineer, Pullman, Ills.

DEAR SIR: Replying to your favor of the 5th inst., we note that ours of the 15th arrived in your absence and was referred to Mr. Sessions for attention. We are as yet, however, without any reply from him.

Our Mr. Knight had intended to visit your works this
284 week, returning from an Eastern trip, but found it impracticable to do so.

Will you kindly advise us about what condition of progress you have reached in the manufacture of our cars?

Yours truly, KNIGHT & BONTECOU.

EXHIBIT "36."

PULLMAN, ILLS., *October 8th*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street Railway Co., Kansas City, Mo.

GENTLEMEN: Referring to your favor of the 15th ult., addressed to our Mr. Twyman, I have to advise you as follows: The width of platform, application of draw-bar at rear end, extra heavy brake-beams, matter of projection of life guards at the front end, and safety chains on trucks will have due attention, in accordance with your wishes expressed.

The height of first step at the open end of car will be 18½" from top of rail, the height of floor from the first step will be 9", and the height of seat 17" from top of floor.

For the head-light we propose inserting a 12" opening in the front dash-board.

I will take pleasure in promptly advising you as soon as we have any of the trucks ready for inspection.

Yours truly, H. H. SESSIONS,
Sup't C. & R.

EXHIBIT "37."

KANSAS CITY, MO., *Oct. 12th*, 1887.

Pullman's Palace Car Co., Mr. H. H. Sessions, sup't of construction & repairs, Chicago, Ill.

DEAR SIR: We have to acknowledge receipt of your favor of 8th inst., contents of which have our attention. We do not clearly understand the height of steps as indicated in your letter, and send you with this a little sketch, on which we have indicated the distance required, as indicated by letters A, B, C, D, & E, and shall feel obliged if you will reply at your earliest convenience.

Yours truly, KNIGHT & BONTECOU,
Chief Eng'rs.

Enclo.

EXHIBIT "38."

KANSAS CITY, MO., *Oct. 22nd*, 1887.

Pullman's Palace Car Co., G. F. Brown, gen'l manag-r, Chicago, Ill.

DEAR SIR: With reference to shipment of our combina-
285 tion cars for the 12th-street line, please note that we would prefer the Chicago & Alton, as before, under similar conditions as to charges.

Yours truly, KNIGHT & BONTECOU,
Chief Eng'rs.

EXHIBIT "39."

CHICAGO, *26th October*, 1887.

Messrs. Knight & Bonticiou, chief engineers Metropolitan Street R'y Co., Kansas City.

GENTLEMEN: I am in receipt of your favor of the 22nd inst., and note that you desire the 25 combination cars shipped via the Chicago & Alton R. R., as before, under similar terms, and we will carry out your wishes.

Very respectfully, GEORGE F. BROWN,
General Manager.

S.

EXHIBIT "40."

PULLMAN, ILL., *October 28th*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: Referring to your favor of 12th inst., I take pleasure in returning you herewith tracing enclosed in same, having noted thereon the different dimensions specified.

Yours truly, H. H. SESSIONS,
Sup't C. & R.

T.

EXHIBIT "41."

KANSAS CITY, MO., *Oct.* 31*st*, 1887.

Pullman's Palace Car Co, H. H. Sessions, sup't of construction, Pullman, Ills.

DEAR SIR: We have to acknowledge receipt of your favor of the 28th inst., giving information desired as to dimensions of cars. We regret that the height of the first step has been made 13½" instead of 10½", as we indicated as desirable, and wish you would arrange to lower this step nearer to the ground; would like to have it not over 11".

Yours truly, KNIGHT & BONTECOU,
Chief Eng'rs.

286 EXHIBIT "42."

PULLMAN, ILL., *Nov.* 4, 1887.

To Knight & Bontecou, engineers Metropolitan Street R'y, K. City:

Can your Mr. Knight pay us a visit to inspect cars nearly completed for Citizens' railway, St. Louis; also to discuss matters, your letter October thirty-first, and other points regarding Metropolitan cars?

H. H. SESSIONS.

EXHIBIT "43."

KANSAS CITY, MO., *Nov. 7th*, 1887.

Pullman's Palace Car Co., H. H. Sessions, sup't, Pullman, Ill.:

Will arrive via Alton Wednesday afternoon and go directly to Pullman.

WM. B. KNIGHT.

EXHIBIT "44."

KANSAS CITY, MO., *Nov. 29th*, 1887.

H. H. Sessions, Pullman's Palace Car Co., Pullman, Ills.:

Chicago Malleable Iron Co. have patterns and grip-castings; conform to figures on our drawing of grip August fifth.

KNIGHT & BONTECOU.

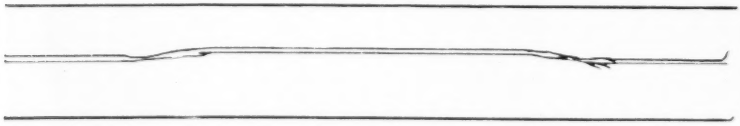
EXHIBIT "45."

PULLMAN, ILL., *Nov. 30th*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'y Co., Kansas City, Mo.

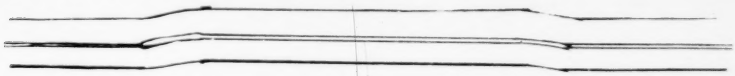
GENTLEMEN: I have your telegram of even date, saying we could get grip-castings from Chicago Malleable Iron Company. What we wanted was a grip complete to try into the grip-truck of your combination cars, so that we might know that everything fitted properly. I was prompted to do this by the experience we have had with the St. Louis grip-cars. We were given to understand that your grip might be followed in arranging the grip-carriers of these trucks, but we find that the grip-quadrant is made 3" lower than is shown on your drawings, from which their grip was supposed to be made. This brings the grip so low that it strikes the cross channel bar of the truck, which we have been obliged to cut down somewhat in order to clear the quadrant. If the grip you use is made exactly according to your blue print, the truck is all right.

I wish to ask if you have an offset in your slob rail where your track rails are straight, thus:



287 We find in the Citizens' line, St. Louis, they have such an offset on straight track, where nearly 4" extra side motion to the grip is called for. This, in my opinion, should not be. Where

the slot rail has an offset I think the track rail should be offset to correspond, thus:



Your grip will always be central with the car, as it should be. If, however, you have this offset in the slot rail and not in track rails, we must make provision for the additional side motion.

Will you please give me this information at your earliest possible convenience?

Yours truly, H. H. SESSIONS, *Manager.*

EXHIBIT "46."

KANSAS CITY, MO., *Dec.* 1*st*, 1887.

Pullman's Palace Car Co., H. H. Sessions, sup't of construction, Pullman, Ills.

DEAR SIR: We beg to hand you with this a blue print showing the maximum vertical curve on our Twelfth-street line, and request that you will kindly examine the details of the construction of the combination car, especially as to the kingbolt or other connection on the rear truck and as to the possible interference of the inner wheels of each truck with any portion of the body of the car when it is in the position shown upon this blue print.

Please bear in mind also that we have vertical curves in the opposite direction to that indicated on this print, although the radii is not so small and the total distance from a chord line between centers of trucks to the top of the rail at the middle of the car will not exceed three inches.

It has occurred to us that the running of such a long car over such sharp vertical curves was an unusual requirement and one which might be easily overlooked and may not have been fully provided for in the construction.

Yours truly, KNIGHT & BONTECOU.

Please examine also as to guards striking pavement at centre.

EXHIBIT "47."

KANSAS CITY, MO., *Dec.* 2*nd*, 1887.

Pullman's Palace Car Co., Mr. H. H. Sessions, gen'l man'g'r, Pullman, Ills.

DEAR SIR: Your favor of Nov. 30th is just to hand, and in reply would say that our grips will be exactly as indicated by the drawing sent you. There has been but one small and immaterial change made in the drawings or castings, which you will be able to note on the blue print sent you under separate cover today. A small additional amount of metal has been put in the bar lettered
288 "M," which you will see does not affect any of the essential measurements. The distance between centers of the carry-

ing pins in grip-frames will be just 22 inches. We would say, however, that the quadrant sketch in the plan of the truck sent us appears to have been taken from a blue print or drawing of the Grand-avenue grip instead of ours, and we have to request that you will carefully investigate this difference in the shapes of the quadrants and see if our inference is correct. We have no hesitation in saying, however, that you may safely rely on our grips being made in strict accordance to the drawings which we send today. Our drawings for this grip have been carefully made, the measurements and distances carefully digested, and we feel confident that they can be relied upon.

We think that the St. Louis Co. really intended to order their grip-frames made to suit the Grand-avenue grip and not the Metropolitan.

With reference to the other matter mentioned in your letter, would say that we put the same deflection in our track rails as in the slot beam, and our grip is therefore always central with the car. We have asked and have to repeat that we would be glad to have you provide about 1½ inches of lateral play in the grip-frame, which will be sufficient to answer all the requirements of our construction.

Trusting that this will meet all the requirements indicated by your inquiries, we are,

Very truly yours, KNIGHT & BONTECOU,
Chief Eng'rs.

EXHIBIT "48."

Subject: Car-heaters.

CHICAGO, *Dec. 3d*, 1887.

E. J. Lawless, Esq., sup't.

MY DEAR SIR: Regarding heating arrangement of your combination cars we are now building for your road, I beg to state that Mr. W. C. Baker called upon me this morning, and I had him examine the plan of your cars. He says he has modified his improved heater to meet the requirements of these cars. The heater will need but 14 inches space.

The cost of his heater for cable cars is $100.00 f. o. b., New York. I have asked him to send you plans, etc.

Yours truly, C. L. PULLMAN.

The price includes piping, drum, and all appurtenances, with ornamental jacket.

EXHIBIT "49."

CHICAGO, *December 3rd*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street Ry Co., Kansas City, Mo.

DEAR SIR: Refer-ing to your recent request that the 25 combination open and closed cars when completed be shipped to

289 you at Kansas City via the Chicago & Alton railroad, I am just advised by the railway company that they will be unable to furnish flat cars for this shipment longer that 30'. As you will readily see, we cannot ship them on 30' cars, the minimum length of the car that we can use being 33', and I would inquire if we are authorized to communicate with the C., B. & Q. R'y or the Rock Island with regard to this shipment.

Please wire me upon receipt of this by what route you desire them to go forward.

Very respectfully, GEO. F. BROWN,
General Manager.

S.

For two letters written by Knight & Bontecou to H. H. Sessions, relating one to gongs and the other to sand-boxes, both dated December 5th, 1887, see the following, which, although introduced as Exhibits 3 and 4 respectively, are here copied in chronological order:

EXHIBIT "3."

KANSAS CITY, MO., *Dec. 5th*, 1887.

Mr. H. H. Sessions, man'g'r Pullman's Palace Car Co., Pullman, Ills.

DEAR SIR: Referring to a conversation with your Mr. C. L. Pullman during a recent visit here, we beg to hand you with this a general design for gong to be put upon our combination cars for Twelfth-street cable line. Although this was not considered by Mr. Pullman to be a part of the trimmings contemplated in the contract with us, we desired that he would furnish and put on these gongs, and further that they should be substantially of the shape which we indicate and which we now do on the blue print sent you.

We further desired that these gongs should have a clear, musical tone, and suggest the following mixture:

Three parts of tin, two of silver, and sixteen of copper.

We should be glad to have you give this matter your best attention.

Yours truly, KNIGHT & BONTECOU,
Chief Eng'rs.

EXHIBIT "4."

KANSAS CITY, MO., *Dec. 5th*, 1887.

Mr. H. H. Sessions, gen'l man'g'r Pullman's Palace Car Co., Pullman, Ills.

DEAR SIR: With reference to the sand-boxes on our Twelfth-street cars, we desire to have two sand-boxes, one delivering in front of the forward truck and the other in front of the rear truck. In speaking with Mr. Pullman recently about this, we judge
290 that this has had no attention and beg that you will kindly make such provisions as may be necessary to — sand-boxes.

KNIGHT & BONTECOU,
Chief Engineers.

EXHIBIT "50."

PULLMAN, ILLS., *December 7th*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan R'y, Kansas City, Mo.

GENTLEMEN: I have to acknowledge receipt of your favor of the 1st and 2d inst., as also the blue print mentioned therein.

Your trucks and grips are being constructed in accordance with the information furnished, and I have no doubt they will work to your entire satisfaction.

Yours truly, H. H. SESSIONS, *Manager.*

EXHIBIT "51."

Telegram.

DEC. 8TH, 1887.

To Knight & Bontecou, Metropolitan Street R'y Co., Kansas City, Mo:

Am waiting reply to my letter third regarding shipment of twenty-five combination cars.

GEO. F. BROWN.

EXHIBIT "52."

Telegram.

DEC. 8TH, 1887.

Geo. F. Brown, Pullman Palace Car Co., Chicago, Ills.:

Alton Company report fifteen long flats available at Chicago for immediate shipment; balance in five days. Prefer shipment by Alton.

(S'g'd) KNIGHT & BONTECOU.

EXHIBIT "53."

Mr. Geo. H. Brown, gen'l man'g'r Pullman Palace Car Co., Chicago, Ills.

DEAR SIR: Your favor of the 3rd came duly to hand and had immediate attention. By referring to the general agent of the C. & A. R'y Co. at this point, he reported to-day that his advices from Chicago were that they had fifteen long flat cars ready to send you for immediate shipment, and that the remainder of the cars necessary to complete the shipment would be furnished within five days. When in receipt of this information we at once wired you to this effect and that we should prefer the shipments to come via the C. & A. R'y, even if there is a little delay in getting the
291 additional cars necessary.

Yours truly,

(S'g'd) KNIGHT & BONTECOU,
Chief Engineers.

EXHIBIT "54."

CHICAGO, *Dec. 9th*, 1887.

Messrs. Knight & Bontecou, engineers Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIRS: Our Mr. Sessions, manager of our works at Pullman, has forwarded to my office sundry letters received from you during the past ten days, relating to the combination cars we are building for your company.

In reply I have to say that your instructions will be complied with. I also take this occasion to request that all future communications relating to cars, either before or after contract is made, be addressed to my office, from which emanate all orders regarding the construction of cars.

This will not only save time but will also prevent any possible misunderstandings or mistakes.

Very respectfully, GEO. F. BROWN,
Gen'l Manager.

EXHIBIT "55."

KANSAS CITY, MO., *December 14th*, 1887.

Pullman's Palace Car Co., Geo. F. Brown, gen'l man'g'r, Chicago, Ills.

DEAR SIR: We have to acknowledge receipt of your favor of the 9th inst. and note your request for communication directly with you with reference to details of construction for our cars.

With reference to gongs, we examined today an eight-inch gong of the Westlake Co. which your assistant brought here, and stated that it was sent for our inspection at your request.

We think that the gong will be satisfactory, and do not feel disposed to have special mixture and pattern made, but will take the gongs submitted for our combination cars.

Yours truly,

(8'g'd) KNIGHT & BONTECOU,
Chief Engineers.

EXHIBIT "56."

CHICAGO, *December 16th*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: I am in receipt of your favor of the 14th instant, in which you approve of our applying gongs to your combination cars, in accordance with the sample submitted you by our
292 ass't sup't, Mr. Leamaster, and instructions have been given our people accordingly. I have this day wired Mr. Leamaster to return the gong now in his possession, as I understand that it is your desire to have the tones as much alike as possible.

Very respectfully, GEO. F. BROWN,
Gen'l Manager.

EXHIBIT "57."

CHICAGO, *December 22nd*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan St. R'y Co., Kansas City, Mo.

GENTLEMEN: Referring to the 25 combination closed and open street cars, I beg to advise you that we expect to have ready for inspection the first lot of these cars the first of next week, and I would be glad if you would have your inspector here at that time.

Please advise me by return mail when he will be here.

Very respectfully, GEO. F. BROWN,
General Manager.

EXHIBIT "58."

Telegram.

KANSAS CITY, MO., *Dec. 27th*, 1887.

Geo. H. Brown, Pullman's Palace Car Co., Chicago, Ills.:

Mr. Lawless will arrive in Chicago Thursday from St. Louis.

(S'g'd) KNIGHT & BONTECOU.

CHICAGO, *January 3rd*, 1887.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'y Co., Kansas City, Mo.

GENTLEMEN: I am in receipt this morning of a message from Mr. J. M. Pitkins, purchasing agent of your company, which reads as follows:

"Please ship all our cars Wabash railway; have arranged with their agent here."

As you will remember, our instructions from the first were to ship these cars via the Chicago & Alton railway, and by referring to my letter of December third you will note that we had some doubt as to the Alton being able to furnish us with cars of the required length, and we wrote you and asked you if you would not name some other route, to which you replied by a telegram on the 8th, and confirmed the same by letter, stating that the Alton Company reported 15 long cars available to Chicago for immediate shipment, and that the balance would be sent us in five days.

293 Since the receipt of such information we have received to date some 18 or more flats, and, of course, are under obligations to ship via the Chicago & Alton railroad, and in case it is decided to change the route it will be necessary for your company to make arrangements with the Chicago & Alton people and pay them any claim that they may make on account of flats being held by us for this shipment. It just occurs to me to further state that if the route is changed, and it is decided to ship via the Wabash, that it will no doubt cause considerable delay, as flat cars at this time of the year are very scarce.

Please wire me upon receipt of this what action we shall take in the matter. In the meantime we will hold the C. & A. flats for the shipments of the cars.

Very respectfully, GEO. F. BROWN,
Gen'l Manager.

EXHIBIT "60."

KANSAS CITY, MO., *Jan. 25th*, 1888.

Geo. F. Brown, gen'l man'g'r Pullman's Palace Car Co., Chicago, Ills.

DEAR SIR: We are disappointed in not having the combination cars for our 12th-street line as anticipated when our Mr. Lawless was at your works. Will you kindly advise us as to cause of the delay in shipment and when we may expect them?

Yours truly, KNIGHT & BONTECOU, *Engineers.*

EXHIBIT "61."

CHICAGO, *January 28th*, 1888.

Messrs. Knight & Bontecou, chief engineers Metropolitan St. R'y Co., Kansas City, Mo.

GENTLEMEN: Your favor of the 25th inst. is received and noted. Quite a number of the cars were practically ready for shipment when Mr. Lawless was here, but for some reason that we have never been able to account for the panels on many of the cars began to crack, and we found it necessary to replace them. The repainting of the panels requires just about as long as it would to repaint the entire car, but the work is being pushed as rapidly as possible, and we expect to begin shipment early next week.

Very respectfully, GEO. E. F. BROWN,
Gen'l Manager.

294 EXHIBIT "62."

KANSAS CITY, MO., *Feb. 2d*, 1888.

Mr. Geo. F. Brown, gen'l man'g'r Pullman Palace Car Co., Chicago, Ills.

DEAR SIR: We have to acknowledge receipt of your favor of the 28th ulto., and regret that you should have encountered any unexpected trouble with the cars. We expect to have our whole line ready to operate by the 1st of March, and it is important that the cars should be here on or before that date.

Yours truly,
(S'g'd) KNIGHT & BONTECOU, *Engineers.*

EXHIBIT "63."

CHICAGO, *February* 11*th*, 1888.

Messrs. Knight & Bontecou, chief engineers Metropolitan Street R'y Co., Kansas City, Mo.

GENTLEMEN: I send you by this mail blue print of the gr-p-trucks No. 16, which we are putting under your 25 combination cars; but I regret to say that I will not be able to forward you a print of the rear trucks, as we have no correct tracing of the same. I presume, however, that the forward truck is the one of which you are more particularly in need.

Very respectfully, GEO. F. BROWN,
Gen'l Manager.

S.

EXHIBIT "64."

Telegram.

KANSAS CITY, Mo., *Feb.* 15*th*, 1881.

Geo. F. Brown, Pullman Palace Car Co., Chicago, Ill.:

Do not want front truck, but drawing rear truck.

(S'g'd) KNIGHT & BONTECOU.

EXHIBIT "65."

KANSAS CITY, Mo., *Feb.* 16*th*, 1888.

Pullman's Palace Car Co., Geo. F. Brown, gen'l man'g'r, Chicago, Ills.

DEAR SIR: Yours of the 11th came duly to hand, and we received with it, not a blue print of the rear truck of our combination cars as stated, but a blue print of "draw-gear plan 279." We wired you at once that it was not the blue print of the front truck which we particularly desired, but a blue print or drawing
295 of the rear truck. We wish this in order to make some designs for special brake appliances on our Twelfth-street incline, and we shall feel very much obliged if you will send us, at your earliest convenience, a correct drawing of the rear truck. We shall also be glad to have a blue print of the forward truck if convenient.

We hope that the first ten of our cars were shipped this week as promised in the letter from C. L. Pullman to your sup't here, as it is important that we should have them as soon as possible.

Yours truly, KNIGHT & BONTECOU,
Chief Eng'rs.

EXHIBIT "66."

CHICAGO, *February 17th*, 1888.

Messrs. Knight & Boutecou, chief engineers Metropolitan St. R'y Co., Kansas City, Mo.

GENTLEMEN: Replying to your message of yesterday, I would say that we are now having a drawing prepared of the rear truck end of your combination car, and I hope to be able to forward same to you by the first of next week.

Very respectfully,

GEO. F. BROWN,
Gen'l Ma'g'r.

EXHIBIT "67."

CHICAGO, *Feb'y 23rd*, 1888.

E. J. Lawless, Esq., superintendent Metropolitan Street R'y Co., Kansas City.

DEAR SIR: I enclose herewith for your signature certificates of inspection and delivery in duplicate for five of your street cars, Nos. 304, 305, 306, 307, and 315, which were forwarded from our works on the 22d inst. Please have these certificates signed and returned to me at your early convenience.

Very respectfully,

GEO. F. BROWN,
Gen'l Manager,

S.

Inspector's Certificate.

I hereby certify that I have this day inspected and received from Pullman's Palace Car Co., Pullman car works, Pullman, Ills., for account of Metropolitan Street R'y Co., five (5) street cars; cars lettered Metropolitan Street Railway Co.

Nos. 304, 305, 306, 307, 315.

Pullman, Ills., Feb'y 22d, 1888.

_____,
Inspector for Met. St. R'y Co.

Certificate of Delivery.

I hereby certify that I have this day received from Pullman's Palace Car Co., Pullman car works, Pullman, Ills., at Pullman, for account of Metropolitan St. R'y Co., five (5) street cars.

Cars lettered Metropolitan Street R'y Co.

Nos. 304, 305, 306, 307, 315.

Pullman, Feb'y 22d, 1888.

_____,
For Met. St. R'y Co.

296 EXHIBIT "68."

CHICAGO, *February 24th*, 1888.

Messrs. Knight & Bontecou, chief engineers Metropolitan St. R'y Co., Kansas City, Mo.

DEAR SIR: In accordance with your request of the 16th inst. I beg to hand you herewith blue print = 359 of our = 15 truck, which we are putting under the rear end of your combination street cars.

I forwarded you on the 11th inst. a blue print of the grip-truck, which, I presume, will give you all the information you desire.

Respectfully, GEO. F. BROWN,
Gen'l Man'g'r.

EXHIBIT "69."

Pullman's Palace Car Company, office of the auditor.

CHICAGO, *Feb'y 24th*, 1888.

Metropolitan Street railway, Kansas City, Mo.

GENTLEMEN: I have pleasure in enclosing our bill for construction of five combination closed and open cable cars, Nos. 304, 305, 306, 307, and 315—amount, $10,000.00—which I trust you will find correct and the cars to your satisfaction, and that you will kindly arrange to have remittance made to our secretary for the amount at your earliest convenience. The bill for minor extras will be sent later.

Yours truly, F. C. N. ROBERTSON,
1st Ass't Auditor.

CHICAGO, ILL., *Feb'y 22nd*, 1888.

Metropolitan Street R'y Co., Kansas City, to Pullman's Palace Car Co., Dr.

For construction of 5 combination closed and open cable cars, Nos. 304, 305, 306, 307, 315, at per car 2,000. ... 10,000 00

Delivery Feb'y 22, 5 cars.

F. C. N. ROBERTSON,
1st Ass't Auditor.

Stamped: Aud'r office, Feb'y 25, '88.

297 EXHIBIT "70."

CHICAGO, *February 25th*, 1888.

E. J. Lawless, Esq., superintendent Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: I inclose herewith bill of lading covering the shipment of five of your street cars, Nos. 304–307, 315, which were forwarded from our works (loaded on Chicago & Alton flats 129, 1175,

1219, 1395, and 1595) on the 22nd instant via the Chicago & Alton R'y.

Very respectfully, GEO. F. BROWN,
General Manager.

S.

Pullman's Palace Car Company.

Pullman railroad.

Manifest of cars delivered to the Belt R. R. at Pull. Jct., to be forwarded as indicated in the margin.

Date and time of delivery, 10 a. m., Feb'y 22, 1888.
Shipper, P. P. C. Co.

P. EDWORD,
Sup't Railroad.

H.

In. No. of cars.	Marks & consignee.	Condition of seals, end doors, &c.	Pullman R. R. chgs. to follow.	Remarks.
Alton, 129, 1595, 1395, 1219, 1175, each loaded with one Metropolitan St. car, =307, 315, 304, 306, 305, and 2 tarpaulins, =21 & 2, 31 and 23, 22 & 7, 16 & 40, 29 & 32, in good condition respectively.	Metropolitan Street Railway Co., Kansas City, Mo., via Chicago & Alton R'y. Chgs. p'p'd to C. & Alton Jct. Rate, $65.00 per car.			

Received the above in apparent good order.

H. McIVER,
Agent R. R.

EXHIBIT "71."

KANSAS CITY, Mo., *Feb. 28th*, 1888.

Pullman's Palace Car Co., Geo. F. Brown, gen'l mang'r, Chicago, Ill.

DEAR SIR: We beg to acknowledge receipt of your favor of the 24th, accompanying blue print No. 359 of your No. 15 truck, being the rear truck on our 12th-street cars, for which please accept our thanks. The first shipment of five cars came in Saturday, and we are looking for the second shipment of five cars Friday. Please advise us of every shipment by telegram.

Yours truly, KNIGHT & BONTECOU,
Chief Eng'rs.

298 EXHIBIT "72."

CHICAGO, *March 1st*, 1888.

E. J. Lawless, Esq., superintendent Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: I enclose herewith for signature certificates of inspection and delivery in duplicate for seven of your street cars, Nos. 309, 312–314, 319–322, which were forwarded from our works on the 29th ultimo by the Chicago & Alton R'y. Please have these certificates returned as soon as signed, and oblige.

I also enclose herewith bill of lading to cover this shipment, which was made on C. & A. flats 1881, 663, 1665, 479, 367, 9019, and C., K. & W. flat 16835.

Very respectfully, GEO. F. BROWN,
General Manager.

S.

Inspector's Certificate.

I hereby certify that I have this day inspected and received from Pullman's Palace Car Company, Pullman works, Pullman, Ill., for account of Met. St. R'y Co., seven (7) street cars, cars lettered Metropolitan Street R'y Co., Nos. 309, 312, 313, 314, 319, 321, 322.

Pullman, Ill., Feb'y 29th, 1888.

____ ____,
Inspector for Met. St. R'y Co.

Certificate of Delivery.

I hereby certify that I have this day received from Pullman's Palace Car Company, Pullman car works, Pullman, Ill., at Pullman, for account of Met. Street R'y Co., seven (7) street cars, cars lettered Metropolitan Street Railway Co., Nos. 309, 312, 313, 314, 319, 321, 322.

Pullman, Feb'y 29th, 1888.

____ ____,
For Met. St. R'y Co.

Pullman's Palace Car Company.

Pullman railroad.

Manifest of cars delivered to the Belt R. R. at Pull. Jct., to be forwarded as indicated in the margin.

Date and time of delivery, 4 p. m., Feb'y 29, 1888.
Shipper, P. P. C. Co.

P. EDWARD,
Sup't Railroad.

Car No. & in.	Contents.	Marks & consignee.	Condition end doors & seals.	Pullman R. R. chgs. to follow.	Remarks.
C., K. & W. 16835 and Alton 1881, 663, 1665, 479, 367, and 9019, each loaded with 1 Met. St. car, No. 321, 319, 314, 312, 322, 313, and 309, and 2 tarpaulins, 34 & 10, 19 and 36, 6 and 26, 18 and 25, 37 and 38, 39 and 41, 14 and 42, in good condition respectively.		Metropolitan Street Railway Co., Kansas City, Mo., via Ch'go & Alton R. R.			
299			Chgs. p'p'd to C. & Alton Jct. Rate, $65.00 per car.		

Rec'd the above in apparent good order.

H. A. McIVER, *Ag't R. R.*

EXHIBIT "73."

EXHIBIT "74."

EXHIBIT "75."

KANSAS CITY, MO., *March 3rd*, 1888.

Geo. F. Brown, Pullman Palace Car Co., Chicago, Ill.

Forward truck of cars will not pass around thirty-foot-radius curve; lengthen stay-chains and cut away lower corner of middle sills.

KNIGHT & BONTECOU.

EXHIBIT "76."

CHICAGO, ILL., *March 3*, 1888.

To Knight & Bontecou, Met. St. R'y, K. City:

Telegram received; will make alterations requested.

GEO. F. BROWN.

300 EXHIBIT "77."

CHICAGO, *March 3rd*, 1888.

E. J. Lawless, Esq., superintendent Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: I inclose herewith for signature certificates of inspection and delivery, in duplicate, for one of your street cars, No 310, which was shipped from our works via the Chicago & Alton R'y on the 1st instant. Please return certificates soon as signed.

I also inclose herewith bill of lading to cover this shipment, which was made on C. & A. flat 1659.

Very respectfully,

GEO. F. BROWN,
General Manager.

S.

Inspector's Certificate.

I hereby certify that I have this day inspected and received from Pullman's Palace Car Company, Pullman car works, Pullman, Ill., for account of Met. St. R'y Co., one (1) street car, cars lettered Metropolitan Street Railway Company, No. 310.

Pullman, Ill., March 1st, 1888.

_____,
Inspector for Met. St. R'y Co.

Certificate of Delivery.

I hereby certify that I have this day received from Pullman's Palace Car Company, Pullman car works, Pullman, Ill., at Pullman, for account of Met. St. R'y Co., one (1) street car, cars lettered Metropolitan Street Railway Co., No. 310.

Pullman, Mar. 1st, 1888.

_____,
For Met. St. R'y Co.

Pullman's Palace Car Company.

Pullman railroad.

Manifest of cars delivered to Belt R. R. at Pullman Jct., to be forwarded as indicated on the margin.

Date and time of delivery, 4 p. m., March 1st, 1888.
Shipper, P. P. C. Co.

P. WARDS,
Sup't R. R.

In. & No. of cars.	Contents.	Marks & consignee.	Condition end doors & seals.	Pullman R. R. chgs. to follow.	Remarks.
Alton, 1659, loaded with one Metropolitan street car, = 310, and two tarpaulins, = 44 and 45, in good condition.		Metropolitan Street Railway Co., Kansas City, Mo., via Chicago and Alton R. R. Chgs. p'p'd to C. & Alton Jct. Rate, $65.00 per car.			

Received the above in apparent good order.
H. A. McIVER, *Ag't R. R.*

301 EXHIBIT "78."

Pullman's Palace Car Co.

Accounting department, office of the auditor.

CHICAGO, *March* 3, 1888.

Metropolitan Street Railway Co., Kansas City, Mo.

GENTLEMEN: Inclosed please find our bill for construction of a further lot of eight of our combination and closed and open cable *cable* cars; amount, $16,000.00; to which kindly give your early attention, and oblige,

Yours truly,
F. C. N. ROBERTSON,
1st Ass't Auditor.

Enclos.

Metropolitan Street Railway Comp. to Pullman's Palace Car Co., Dr.

CHICAGO, *Feb. 29th*, 1888.

For construction of 8 combination closed and open cable cars, Nos. 309, 310, 312, 313, 314, 319, 321, 322, at per car $2,000 ..... $16,000 00

Delivery, Feb'y 27, 8 cars.

F. C. N. ROBERTSON,
1st Ass't Auditor.

Stamped: Aud'r office, Mar. 2, '88.

EXHIBIT "79."

Inspector's Certificate.

I hereby certify that I have this day inspected and received from Pullman's Palace Car Company, Pullman car works, Pullman, Ills., for account of Metropolitan Street Railway Co., 2 street cars,
302 cars lettered Metropolitan Street Railway Co., Nos. 303, 308. Pullman, Ill., March 17th, 1888.

____ ____,
Inspector for Met. St. R'y Co.

Certificate of Delivery.

I hereby certify that I have this day received from Pullman's Palace Car Company, Pullman car works, Pullman, Ill., at Pullman, for account of Metropolitan St. R'y Co, 2 street cars, cars lettered Metropolitan Street Railway Co., Nos. 303 and 308.
March 17, 1888.

____ ____,
For Met. St. R'y Co.

Pullman's Palace Car Company.

Pullman railroad.

Manifest of cars delivered to the Belt R. R. at Pull. Jct., to be forwarded as indicated in the margin.

Date and time of delivery, 4 p. m., 3, 17, 1888.
Shipper, P. P. C. Co.

P. EDWARD, *Sup't R. R.*
H.

In. & No. of cars.	Contents.	Marks & consignee.	Condition end doors & seals.	Pullman R. R. chgs. to follow.	Remarks.
Mo. Pac. 11776 and Alton 865, each loaded with one Metropolitan street car, No. 303 and 308, and 2 tarpaulins (in good condition), = 40 and 29, 11 & 46 respectively.		Metropolitan Street Railway Company, Kansas City, Mo., via Chicago & Alton R'y. Chgs. p'p'd to C. & Alton Jct. Rate, $65.00 per car.			

303 Received the above in apparent good order.
H. A. McIVER, *Ag't R. R.*

EXHIBIT "80."

KANSAS CITY, MO., 23 *M'ch*, 1888.

Geo. F. Brown, Esq., gen. m'g'r.

DEAR SIR: We tried one of your cars over the line yesterday and found that the brakes would not work satisfactorily—in fact, were perfectly useless. I think the reasons for this are, there being so many connections, and consequently so much lost motion, that before the shoes hug the wheels the brake-lever comes to the limit of the quadrant.

Before starting out with the car we adjusted the brakes so that the shoes touched the wheels, but notwithstanding this we could not lock the wheels, or even hold the cars on the lightest grades.

As a perfect-working brake is an imperative matter with us, I would like to hear from you upon the subject and what remedy you propose.

Yours truly, EDW. J. LAWLESS.

304 Please send six of the small horizontal wheels for the truck which revolve on the new castings you recently sent. I broke one the other day and would like to have some extra on hand.

EXHIBIT "81."

CHICAGO, *March* 27, 1888.

E. J. Lawless, Esq., general superintendent Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: I inclose herewith for your signature certificates of inspection and delivery, in duplicate, for four of your combination cars, Nos. 302, 320, 324, & 325, which were forwarded from our works on the 24th instant. Please have these certificates returned as soon as signed.

I also inclose bill of lading to cover this shipment, which was made via the Chicago & Alton R'y, on Chicago & Alton flats Nos. 899, 1239, 1077, and 1451.

Very respectfully, GEO. F. BROWN,
General Manager.

S.

Inspector's Certificate.

I hereby certify that I have this day inspected and received from Pullman's Palace Car Company, Pullman car works, Pullman, Ills., for account of Met. St. R'y Co., four (4) street cars, cars lettered Metropolitan Street Railway Company, Nos. 302, 320, 324, 325.

Pullman, March 24, 1888.

_____,
Inspector for Met. St. R'y Co.

Certificate of Delivery.

I hereby certify that I have this day received from Pullman's Palace Car Company, Pullman car works, Pullman, Ill., at Pullman, Ills., for account of Metropolitan Street Railway Company, four (4) street cars, cars lettered Metropolitan Street Railway Company, Nos. 302, 320, 324, 325.

Pullman, Mar. 24, 1888.

____ ____,
For Met. St. R'y Co.

Pullman's Palace Car Co.

Pullman railroad.

Manifest of cars delivered to the Belt R'y at Pullman Jct., to be forwarded as indicated in the margin.

Date and time of delivery, 4 p. m., March 24, '88.
Shipper, P. P. C. Co.

P. EDWARD, *Sup't R. R.*

In. & No. of cars.	Contents.	Marks & consignee.	Condition end doors & seals.	Pullman R. R. chgs. to follow.	Remarks.
395	C. & Alton cars 899, 1239, 1077, & 1451, each loaded with one Metropolitan street car, = 302, 320, 304, and 325, and 2 tarpaulins, in good condition respectively.	Metropolitan Street Railway Company, Kansas City, Mo., via Chicago and Alton R. R. Co. Chgs p'p'd to C. & Alton Jct. Rate, $65.00 per car.			

Received the above in apparent good order.

H. A. McIVER, *Ag't R. R.*

EXHIBIT "82."

Pullman's Palace Car Co.

OFFICE OF THE AUDITOR, CHICAGO, *March* 27, '88.

Metropolitan Street Railway Co., Kansas City, Mo.

GENTLEMEN: Enclosed herewith I beg to hand you our bill of the 22nd inst. for a further shipment of six cable cars, Nos. 302, 303, 320, 3—, 324, and 325, amount $12,000.00, to which I would ask your kind attention.

Yours truly,

F. C. N. ROBERTSON,
1st Ass't Auditor.

Enclos.

CHICAGO, *March* 22, 1888.

Metropolitan Street Railway Co., Kansas City, to Pullman's Palace Car Co., Dr.

For construction of 6 combination closed and open cable cars, Nos. 302, 303, 308, 320, 324, 325, at per car $2,000.00..... $12,000 00

Delivery, March 17, 2 cars.
" 24, 4 "
6 " } Average date, March 22.

F. C. N. ROBERTSON,
1st Ass't Auditor.

Stamped: Aud'r office, Mar. 22, '88.

EXHIBIT "83."

PULLMAN, ILL., *March 29th*, 1888.

J. E. Lawless, Esq., gen. sup't Metropolitan Street Railway Co., Kansas City, Mo.

DEAR SIR: I find that all your cars, with the exception of six, have already been shipped, and these last six cars are loaded & packed ready for shipment. It therefore appears to me to be the better plan to let them come on to you with the others, so that you may make the requisite change in the brake-lever to the whole of the cars, and I have so advised Mr. Sessions.

Yours truly, A. TWYMAN, *Engineer.*

306 EXHIBIT "84."

CHICAGO, *March 30th*, 1888.

E. J. Lawless, Esq., superintendent Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: I inclose herewith for signature certificates of inspection and delivery, in duplicate, for the last six of your street cars, Nos. 301, 311, 316–318, 323, which were forwarded from our works on the 29th instant. Please have these certificates returned to me as soon as signed.

I also inclose bill of lading to cover this shipment, which was made via the Chicago & Alton R'y.

Very respectfully, GEO. F. BROWN,
General Manager.

S.

Inspector's Certificate.

I hereby certify that I have this day inspected and received from Pullman's Palace Car Company, Pullman car works, Pullman, Ill., for account of Metropolitan Street Railway Co., six (6) combination

street cars, cars lettered Metropolitan Street Railway Co., Nos. 301, 311, 316, 317, 318, 323.

Pullman, Ill., March 29, '88.

____ ____,
Inspector for Met. St. R'y Co.

Certificate of Delivery.

I hereby certify that I have this day received from Pullman's Palace Car Company, Pullman car works, Pullman, Ill., at Pullman, for account of Metropolitan Street R'y Co., six (6) combination street cars, cars lettered Metropolitan Street Railway Co., Nos. 301, 311, 316, 317, 318, 323.

Pullman, March 29th, 1888.

____ ____,
For Met. St. R'y Co.

Pullman's Palace Car Co.

Pullman railroad.

Manifest of cars delivered to the Belt R. R. at Pullman Junct., to be forwarded as indicated in the margin.

Date and time of delivery, 4 p. m., 3, 29, 1888.
Shipper, P. P. C. Co.

P. EDWARD,
Sup't Railroad.

H.

Ini. & No. cars.	Contents.	Marks & consignee.	Condition end doors & seals.	Pullman R. R. chgs. to follow.	Remarks.
C. & Alton 1613, 1653, 1715, 1121, 289, M. P. 11553, each loaded with one Metropolitan St. car, 317, 301, 323, 316, 311, 318, and 2 tarpaulins, = 54 and 55, 48 and 28, 49 and 37, 35 and 39, 30 and 21, 52 and 45, in good condition respectively.		Metropolitan Street Railway Company, Kansas City, Mo., via Chicago and Alton R. R. Co.		Chgs p'p'd to A. & Alton Jct. Rate, $65.00 per car.	

Received the above in apparent good order.

H. A. McIVER,
Agent R. R.

307 EXHIBIT "85."

Pullman's Palace Car Company.

OFFICE OF THE AUDITOR,
CHICAGO, *Mar.* 30, '88.

Metropolitan Street R'y Co., Kans. City, Mo.

GENTLEMEN: Herewith please find our bill for construction of six combination closed and open cable cars, shipped March 29th, amount $12,000.00, which I trust you will find correct.

The bills for the extras on gongs and repairing will be sent you later.

Yours truly, F. C. N. ROBERTSON,
1st Ass't Auditor.

Enclos.

CHICAGO, *March* 29, 1888.

Metropolitan Street Railway Co., Kans. City, to Pullman's Palace Car Co.

For construction of 6 combination closed and open cable cars, Nos. 301, 311, 316, 317, 318, 323, at per car $2,000.00 ..... $12,000 00

Delivery, March 29.

F. C. N. ROBERTSON,
1st Ass't Auditor.

Stamped: Aud'r office, Mar. 31, '88.

308 EXHIBIT "86."

Pullman's Palace Car Company.

General manager's office, Geo. F. Brown, general manager.

CHICAGO, *April 5th*, 1888.

C. F. Morse, Esq., president Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: The entire lot of 25 cars have been delivered, 13 of them having been shipped in February. Bills have been rendered your company for the amount of $50,000.00, being the original contract price without extras, bills for which will be sent your auditor in a few days.

Will you kindly direct a prompt remittance for the bills already rendered, and oblige.

Very respectfully, GEO. F. BROWN,
General Manager.

Dictated.

EXHIBIT "87."

CHICAGO, *April 6th*, 1888.

E. J. Lawless, Esq., sup't Metropolitan St. R'y Co., Kansas City, Mo.

DEAR SIR: On Mr. Twyman's return from Kansas City he informed me that he learned while there that two cushions from the short seats next to the door on one of your combination cars
309 were missing upon its arrival in Kansas City, and it occurs to me to inquire if you desire us to furnish two more cushions for the seats, rendering bills against your company.

The claim for shortage, of course, should be made on the railway company direct, the cars being delivered at our junction, and I am assured that they were completed when they left our works.

Very respectfully, GEO. F. BROWN,
General Manager.

S.

EXHIBIT "88."

KANSAS CITY, MO., *April 11th*, 1888.

George F. Brown, Esq., gen'l m'g'r Pullman Palace Car Co., Chicago, Ill.

DEAR SIR: I have delayed answering your letter of April 5th for some days, as I wished to see your cars in practical operation before making a reply.

The Twelfth-street cable line has been running since Saturday, and we should now be operating with a full equipment if we had not been obliged to make constant repairs and changes to the car brakes.

These are very unsatisfactory, and we have hardly been able to make a round trip with a car without stopping to make repairs, and on several occasions have been obliged to run over a considerable portion of the line with no power to set the brakes.

I will make no attempt to go into this matter in detail, but wish to say that I shall insist on these cars being made right in this respect before I should be willing to approve your bills.
310 If you will send a practical man here to take charge of these necessary changes, it will be the best plan; otherwise we shall be obliged to make them and charge you with the expense.

There are some other things about the cars which are not as they should be, but which do not interfere with the operation of them. Many of the panels are badly cracked, and the painting on part of the cars, at least, is very poorly done. The attention of your engineer was called to these points, and he admitted that the work was not as it should be.

I have no desire to delay the settlement of your bills, and would gradly approve vouches for them today if we could use the cars, as it is costing the company a very large amount of money every day that we cannot operate with a full equipment. Let me hear from

you in regard to what action you will take as to the brake repairs at your earliest convenience, and oblige,

Yours truly, C. F. MORSE, *President.*

EXHIBIT "89."

CHICAGO, *April 13th*, 1888.

C. F. Morse, Esq., president Metropolitan St. R'y Co., Kans. City, Mo.

DEAR SIR: Your favor of the 11th inst. received and noted. I regret to hear that you are having any further trouble with the brakes on the combination cars, as our engineer reported on his return that the trial make of the brake on one of the cars while he was there, after some slight changes had been made, proved entirely satisfactory, and there was every reason to suppose that with
311 these little changes the brakes would work well on the remaining cars.

I regret that your engineer or superintendent did not wire us of the situation as indicated in your letter, as we would have sent our engineer over immediately. As it is he will leave for Kansas City tonight, and I trust that in conjunction with your people the defects reported can be easily remedied.

Our engineer did report on his return that the pain- was acting badly on a portion of the new cars, and we are sending out two experienced men to attend to the paint-work on such of the cars as require it.

It is proper to explain just here that the defect seems to be with the middle panel, which is painted with what is called "crimson lake," and which is one of the most difficult colors to hold.

We regret exceedingly that there has been any trouble in this regard, and you may rest assured that the defects will be remedied without expense to your company. Speaking of the paint reminds me that our people report that the alkali water is very severe on the finish of your cars, as we know from our own experience with sleeping cars where alkali water is used.

Another suggestion in this connection I beg to make is that if your people would take the new cars in shop within about four or five months after they are received and give the paint a thorough cleaning and then two coats of varnish they will run for at least a year without having to be varnished again, and it would also preserve the life of the paint.

Very respectfully, GEO. F. BROWN,
General Manager.

312 EXHIBIT "90."

CHICAGO, *April 23rd*, 1888.

E. J. Lawless, Esq., superintendent Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: Referring to the matter of lamps, I am in receipt of information from the manufactures, who say that they have perfected a lamp that will give entire satisfaction, and expect to ship

in a few days enough to supply your cars. Please let me hear from you on this subject upon receipt of the lamps.

Yours truly, C. L. PULLMAN,
Contracting Agent.

L.

313 EXHIBIT "91."

PULLMAN, ILL., *April 24th*, 1888.

E. J. Lawless, Esq., sup't Metropolitan street railway, Kansas City, Mo.

DEAR SIR: I am sorry not to be able to return to Kansas City as quickly as I anticipated. We have, however, arranged to send you a man immediately, who will take charge of the necessary alterations upon your cars. There will be no necessity for him leaving Kansas City until everything is arranged to your satisfaction, and I will probably come out there again towards the end of the week.

Faithfully yours, A. TWYMAN, *Engineer.*

EXHIBIT "92."

CHICAGO, *April 28th*, 1888.

E. J. Lawless, Esq., Metropolitan Street Ry Co., Kansas City, Mo.

DEAR SIR: Referring to the 25 combination cars built for your line, our manager suggests that on account of the very heavy grades of your road it would be an advantage if you were to use gun-metal brake-shoes instead of Congdon shoe, with which the cars were originally equipped, inasmuch as a softer metal will hold the cars much more readily when the brakes are applied, and if you see no objection to this alteration we will take pleasure in substituting, without additional cost to your company, gun-metal shoes for those now on the cars.

Our manager, Mr. Sessions, thinks you will find this change quite an advantage to the successful working of the brakes.

In case you approve of the above we will arrange at once to have gun-metal shoes shipped to you, and also for the application of the same.

An early reply will greatly oblige.

Yours respectfully, GEO. F. BROWN,
General Manager.

S.

EXHIBIT "93."

KANSAS CITY, MO., *3rd May*, 1888.

Geo. F. Brown, Esq., gen. m'g'r.

DEAR SIR: I really cannot see why we should go to the expense of using gun-metal brake-shoes. In the first place, there are lines running here with steeper grades than ours who use the or-
314 dinary brake-shoes and have no difficulty in stopping their trains; secondly, the brake-shoes are so adjusted on your

cars now that even while running there is considerable friction on the shoe (a very serious objection), so that if made of soft metal they would last a very short time.

Thirdly, we have a car made by the Laclede Car Co. of St. Louis that has been running regularly for the past week, fitted with the ordinary brake-shoes, with which no difficulty has been experienced in stopping on any of our grades.

I trust the new lamps will come soon, as the old ones are giving us considerable trouble and annoyance.

Yours truly, EDW. J. LAWLESS.

EXHIBIT "94."

CHICAGO, *May 7th*, 1888.

E. J. Lawless, Esq., superintendent Metropolitan St. R'y Co., Kansas City, Mo.

DEAR SIR: Your favor of the 3rd inst. received and noted. My suggestion in regard to gun-metal brake-shoes was made on the recommendation of our engineer, who is of the opinion that softer metal would give greater braking power.

It is admitted that the soft metal would wear more rapidly than the harder, but the advantages to be gained by the use of the former are considerably more than to counterbalance the increased expense.

So far as the cost of the two kinds of shoes is concerned, it may be explained that the gun-metal shoes cost less than the Congdon shoes, which we applied to your cars. If you prefer, however, the common cast shoes, its first cost is less than the Congdon shoe, and it may, perhaps, do just as good service. We applied the Congdon shoe on the cars already received because we understood you preferred it.

As regards the lamps which you say are still working unsatisfactorily, I may say that we expect to be able to replace them within a few days. We felt sure that the application of the globe fixture would have overcome all the defects, and we are surprised to learn that this device did not work in these last cars.

Very respectfully, GEO. F. BROWN,
General Manager.

S.

EXHIBIT "95."

PULLMAN'S PALACE CAR COMPANY,
GENERAL MANAGER'S OFFICE, CHICAGO, *May 8th*, 1888.

Col. C. F. Morse, president Met. St. R'y Co., Kansas City, Mo.

DEAR SIR: I beg to inclose herewith bill against your company, amounting to $4,153.24, for sundry items which were considered as extras on the 25 cars recently built for your company, and would ask that you kindly direct a prompt remittance of same.

315

Very respectfully, GEO. F. BROWN,
General Manager.

S.

CHICAGO, *March 11th*, 1888.

Metropolitan Street Railway Co., Kansas City, to Pullman's Palace Car Co.

Extras on 25 comb. closed and open cable cars, Nos. 301 to 325, delivered in Feb'y & March (average date, March 11th), as follows:

For excessive cost of cross-seats applied instead of longitudinal, at, per car, 126.50	3,162 50
Furnishing and applying 1 gong to each of the 25 cars.	196 02
Furnishing and applying 2 extra Reliable sand-boxes to each of the 25 cars, including freight from Boston	754 97
For renumbering 11 of above cars	39 75
	$4,153 24

F. C. N. ROBERTSON,
1st. Ass't Auditor.

Stamped: Aud'r office, May 3, '88.

EXHIBIT "96."

KANSAS CITY, MO., *May 12th*, 1888.

316 George F. Brown, Esq., general manager Pullman's Palace Car Co., Chicago, Ill.

DEAR SIR: I have delayed corresponding with you further in regard to the 12th-street cars until your mechanic had finished his work.

The result of this work has been very little material improvement in the action of the brakes, and the cars at no time during the progress of the repairs have been in a satisfactory condition to operate, and are not in such condition now.

This fact has been reported to the board of directors, which has today passed a resolution rejecting the 25 cars furnished by your company for 12th street on account of the imperfect brakes and other seriously objectionable features, and has instructed me to notify you to this effect, and that the cars are subject to your order.

I am, yours respectfully, C. F. MORSE, *President.*

EXHIBIT "97."

Pullman's Palace Car Company: general manager's office, Geo. F. Brown, general manager.

CHICAGO, *May 17th*, 1888.

C. F. Morse, Esq., pres't Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: Your letter of the 12th inst., relating to the twenty-five combination cars built by this company for your company, has been received and noted.

316½ You are cognizant of the fact that the cars were built according to plans approved by your chief engineer, the material used, as well as the workmanship, being first-class in all respects.

The cars before shipment were inspected and accepted by your gen'l superintendent. The cars were then shipped to, received, and put in use by you. Subsequently you made complaint that the brakes did not in all respects work satisfactorily, and a competent mechanic was promptly sent to examine the brakes and make any adjustment found necessary. When the brakes were examined and adjusted on one car your officers pronounced them satisfactory. Thereupon the brakes were in like manner examined and adjusted on the remaining cars, all the cars then being in use by your company.

In view of the facts your present statement to the effect that you reject the cars on account of "imperfect brakes and other seriously objectionable features" is quite astonishing, and I must assume that you have been misinformed as to the condition of the cars, as I am unwilling to believe that you would knowingly allow yourself to be a party to such an unreasonable and unfounded claim.

I have to request, therefore, that you will without further delay remit the amount due this company for said cars, as per bills heretofore rendered, and thus avoid the necessity of any action on our part to enforce the payment of the amount due us.

Very respectfully, GEO. F. BROWN,
General Manager.

317 EXHIBIT 98.

Pullman's Palace Car Company to Metropolitan Street Railway Co., Dr.

Ap'l 23, 1888.

1888.			
March 6.	Freight charges on 5 cars, Nos. 304, 305, 306, 307, 315.....	115 00	
	Switching to Belt R'y.....	10 00	
			125 00
	Freight charges on 7 cars, Nos. 309, 312, 313, 314, 319, 321, 322.....	154 00	
	Switching to Belt R'y.....	21 00	
			175 00
March 8.	Freight charges on 1 car, = 310....	22 00	
	Switching to Belt R'y.....	3 00	
			25 00
March 9.	Drayage on 12 cars from R. R. tracks to 12th-St. power-house.....		120 00
March 27.	Freight charges on 2 cars, Nos. 303 & 308..		44 00
March 28.	Drayage on 13 cars from R. R. tracks to power-house.....		142 50
April 4.	Freight charges on 6 cars, Nos. 301, 311, 316, 317, 318, 523.....		360 00

April	24.	Switching 11 cars to Belt R'y	33 00
May	14.	Freight charges on 4 cars, Nos. 302, 320, 324, 325 ..... 240 00	
		Less amount refunded by R. R. Co. per bill 1009 ..... 152 00	
			88 00
June	13.	Excavating earth for house for storing cars; 835 c. y'ds at 15c.	124 95
"	19.	Building car-house	1,527 00
"	30.	Painting car-house	48 00
"	30.	Labor laying tracks in house	115 00
"	30.	Labor moving cars from power-house to car-house for store	35 49
Aug.	6.	Lumber for repairing car-house	3 36
		Total	$2,966 30
		Less amount refunded by Belt R'y Co.	24 00
			$2,942 30

318 The above and foregoing was all the testimony offered or introduced by either of the parties on the trial of the above-entitled cause.

This cause formerly came on for hearing at the March term, 1889, of this court, before Hons. David J. Brewer, circuit judge, and Jno. F. Philips, district judge, a jury having been waived by stipulation in writing. The evidence on that hearing and the proceedings were taken down by a stenographer and transcribed by him. At the trial of this cause, before Hons. Henry C. Caldwell, circuit judge, and Jno. F. Philips, district judge, by consent of parties, the presentation in court of the witnesses was waived, and the said transcript of evidence, with the proceedings as therein detailed, was read as the evidence in the cause, and is as above set out, but none of the objections to the admission or exclusion of evidence, as in said transcript noted, were called to the attention of the court nor was its decision or judgment thereon asked nor was any such decision or judgment given or rendered by the court, and no exceptions thereto were taken or saved.

And thereupon the court heard arguments upon the issues, and at the time requests for findings of facts and declarations of law were presented to the court by plaintiff, which facts the court refused to find; to which refusal plaintiff then and there duly excepted, and which declarations of law the court refused to hold; to which refusal of the court plaintiff then and there duly excepted, and which requests for findings of facts and declarations of law were in words and figures as follows:

I.

319 The plaintiff, an Illinois corporation, for a long time prior to the transactions in controversy in this cause was extensively engaged, among other things, in the manufacture

of railroad cars and ordinary street cars, but had only built two combination cars for use on a street cable railway prior to building the twenty-five combination cars for defendant.

II.

The defendant for a long time prior to the transactions now in controversy was and ever since has been and still is a Missouri corporation engaged exclusively in the operation of lines of street railway, including what are known as cable lines, in Kansas City, Missouri, and in Kansas City, Kansas.

III.

For some months before June 14, 1877, the date of the contract on which this action is founded, defendant was engaged in the construction of a double-track railway for street-railway purposes in Kansas City, Missouri, extending from the east side to the west side of the city and to the stock yards. The maximum grade of this line is fourteen per cent.—that is, fourteen feet ascent in a distance of one hundred feet. This grade is five or six hundred feet long. Upon the line there are a number of grades running up to ten per cent, and also a number of very sharp curves. The line is known as defendant's 12th-street line.

IV.

Defendant had a firm of civil engineers in charge of the construction of the road. They were engineers of good standing, had had much experience in building cable street railway, and one of them was devoting most of his time to the personal supervision of
320 defendant's line of road then in process of construction. These engineers had carefully examined the road and ascertained the grades and curves thereon, and had made profile maps thereof, and were thoroughly familiar with every part of it.

V.

On May 15, 1887, the road-bed was constructed and track laid, and defendant's engineers wrote plaintiff as follows:

"KANSAS CITY, MO., *May* 13, 1887.

Mr. Chas. Pullman, Pullman Palace Car Co., Pullman, Ill.

DEAR SIR: We write you to say that we are now ready to talk cars for our Wyandotte and Twelfth street lines, and should be glad to have you call on us at your convenience.

Yours truly, KNIGHT & BONTECOU,
Chief Engineers."

VI.

Pursuant to this letter Charles Pullman, an agent of plaintiff, whose only business was to solicit and make contracts for the construction of cars, went to Kansas City to obtain the contract to build such cars as defendant might need. While there he did not go

over the 12th-street line and did not examine or observe its curves, grades, or construction. He was not a civil engineer and knew nothing about such matters and was not told anything about them.

VII.

While there Charles Pullman entered into negotiations with defendant for the construction of twenty-five combination cars and then returned to Chicago, where there was prepared a con-
321 tract for the building of the cars, which, with the specifications thereto attached, was as follows:

Agreement.

CHICAGO, ILLS., *June* 14, 1887.

Metropolitan Street Railway Co., Kansas City, Mo.

GENTLEMEN: Pullman's Palace Car Company will build for the Metropolitan Street Railway Company twenty-five (25) combination closed and open cable cars, as per general specifications attached hereto and made part of this agreement, and deliver the same f. o. b. Pullman Junction or Kensington, Illinois, on or before October 10, 1887, delays by fires, strikes, and unavoidable hindrances excepted, for the sum of two thousand ($2,000.00) dollars each.

Terms, cash on deliveries.

Cars to be inspected and accepted at our works.

Your written acceptance hereof will constitute a contract mutually binding upon both companies.

(Executed in duplicate.)

PULLMAN'S PALACE CAR COMPANY,
By GEORGE F. BROWN, *General Manager.*

Accepted June 27, '87.

METROPOLITAN STREET RAILWAY COMPANY,
By KNIGHT & BONTECOU, *Chief Engineers.*

General Specifications

For twenty-five (25) combination cars, lot —, plan 510, for account of Metropolitan Street R'y Co.

322

Ground plan.	Length, 34 feet 9 inches — all; width, 6 feet 6 inches or more over sills.
Framing.....	Height from top of sill to under plate, —.
Flooring.....	Pullman st'd.
Style of outside....	Number of windows each side, 8.
Roof.....	Number of windows each end, 2.
Hood.....	

Window sash, cherry.
Glass, D. T. French. Size—lower, —; upper, —.
Glass, in clear story, embossed. Size, —.
Glass, in doors, D. T. French. Size—lower, —; upper, —.
Blinds, cherry frames, basswood slats.
Ceiling, mahogany; decoration, —.

Inside finish, same as 16-feet cars recently built.
Seat ends, —; seating capacity, —.
Seats and backs, same as 16-feet cars recently built.
Seat and back springs, —.
Seat and back covering, Wilton plush carpet.
Trimmings, bronze; basket racks, —.
Lamps, centre; two in closed and one in open part.
Lamp bracket, none.
Water cooler, none.
Heater, none.
Saloons, none.
Locks, none.
Body colors, same as 16-feet cars recently built.
Decoration, suitable design.
Lettering, —.
Numbers, from 200 to 224, inclusive.
Names, none.

323 Platforms, 3 feet 9 inches per sketch, with one gate on left-hand side.

Height from top of rail to center of drawbar, —.
Colors, same as 16-feet cars recently built.
Draw-springs, —; buffer springs, —.
Brakes to be operated by gripman, with lever, both trucks.
Brake-power, —.
Sand-boxes to be applied on front truck at centre.
Trucks, Pullman st'd for cable cars.
Gauge, 4 feet 8½ inches.
Wheel base of truck, rear truck, 4 feet 0 inches; front truck, short as possible to admit grip.
Colors, —.
Wheels, Fulton foundry.
Axles, 3½ inches, iron.
Springs, bolster, —; pilot on front truck.
Springs, equalizer, Vose.
Pedestals, Bemis; wire guards on side.
Oil-boxes, Bemis.
Oil-box lids, Bemis.
Brake-shoes, Congdon flange.
Journal bearings, Bemis.

REMARKS.—Extra brakes on rear truck operated by brake-mast, with wheel at rear-end platform.

VIII.

The contract was forwarded to defendant with the following letter:

"Chas. F. Morse, Esq., president Metropolitan Street Railway Co., Kansas City, Mo.

DEAR SIR: I beg to enclose herewith contract, with speci-
324 fications attached executed by me in duplicate, for the building of twenty-five (25) combination closed and open street

cars for your company. Kindly sign and return to me one copy of contract for our files.

You will notice in the specifications that the space for the lettering has been left blank and I would be glad if you would indicate on the specifications returned the lettering you desire applied to the cars.

Very respectfully, GEO. F. BROWN,
General Manager."

IX.

Defendant returned the contract to plaintiff with the following letter:

"KANSAS CITY, MO., *June* 27, 1887.

Pullman Palace Car Company, G. F. Brown, gen'l manager, Chicago, Ills.

DEAR SIR: Your letter of the 21st, enclosing contract and specifications in duplicate for the 25 combination cars for our Twelfth-street line, addressed to our President Morse, has been referred to us for attention in his absence, and we enclose you with this one copy duly executed by us on behalf of the company.

Will you kindly advise about when we may expect to get the general plans which Mr. Pullman, when here, promised to let us have?

Yours truly, KNIGHT & BONTECOU,
Chief Engineers."

Defendant also added to the specifications: "Plans to be sent for approval Met. Co.'s eng'r."

325 X.

In July, 1887, defendant's engineers wished to make certain changes in the specifications and sent plaintiff certain additional specifications, which changed the original specifications in certain ways, among others, making the cars much wider, and which were as follows:

"*Specification.*

KANSAS CITY, MO., *July* 16, 1887.

Combination cars for Metropolitan Street Railway Company.
Length to be 33 feet over all.
Width, 8 ft. 3 in. over all.
Width of floor frame, 7 ft. 3 in.
Height from top of track to top of floor, 2 feet 3½ in.
Distance between centres of trucks, 20 feet 0 inches.
Wheel base of truck, 4 feet 8 inches.
Distance from front of car to center of forward truck, 4 ft. 9 in.
Length of closed part of car, 20 ft. inside.
Length of open portion, 8 ft. 9 in.
Rear platform, 3 ft. 7 in.
Size of wheels, 22 in. diameter.
16 cross-seats, to be fixed as decided.
Approved July 16th, 1887.
(Signed) KNIGHT & BONTECOU, *Engineers.*"

XI.

At the time of making the original contract some discussion was had as to whether seats should be put in the cars lengthwise with the cars or crosswise. The specifications attached to the contract for the construction of the cars at two thousand dollars each
326 provided that the seats should be the same as in sixteen other street cars which plaintiff had then lately built for defendant and in which seats were arranged lengthwise in the cars. It was agreed, however, that plaintiff would substitute cross-seats in the cars to be built if requested, and would charge the extra cost of that or any other changes or extras.

XII.

Plaintiff then proceeded with the construction of the cars. Defendant's engineers went to plaintiff's works while the cars were being constructed and directed several alterations to be made; found fault with the brakes as then in process of construction, and gave orders for changes in them. It was after one of these visits that the above additional specifications were sent plaintiff.

XIII.

In December, 1887, defendant's superintendent went to plaintiff's works to inspect the cars. From ten to fifteen cars were then completed. A thorough inspection was made. The brakes were fully tried as far as they could be without putting the cars in operation. Tests were made with chissels, etc., as to the distance the brakes hung from the wheels and how quickly and efficiently the power could be applied. Defendant's superintendent directed some change to be made in the handle of the brake, and such change was made. Defendant's superintendent then pronounced the cars satisfactory, directed their shipment, and told plaintiff that if the other cars were completed in the same way they should be shipped without further inspection. They were so completed and shipped.

XIV.

All facilities for inspection that were asked for by defend-
327 ant's superintendent were accorded him. No complaint is made by defendant of any fault in the construction of the cars that its inspector could not then have ascertained, and the contract required inspection and acceptance at plaintiff's works.

XV.

At that inspection defendant's superintendent suggested that the brake-lever was too far away from the gripman, so that when standing at his grip he would have to take two steps to get to the brake-lever. Defendant's superintendent directed that this be changed by bending the brake-lever. The change was made in all the cars at Chicago before they were shipped. Afterwards, when the cars reached Kansas City, defendant changed the brake-lever back again to the original position.

XVI.

The cars were shipped plaintiff at different dates between February 24th and March 30, 1888, and when received by defendant were stored in one of its buildings, as the line was not then ready for operation.

XVII.

One of the cars was tried on March 22, 1888, over that part of the line then completed, and defendant experienced some trouble with the brakes, and claimed that when the brakes were unset the brake-shoe hung so close to the wheel that in going around curves the brake-shoe bound the wheel and stopped the car, and that if the brake-shoe were set farther back the brake-lever would be moved as far as it could be without sufficiently binding the brakes to the wheel. In other words, it is claimed that the full movement given the brake-lever did not move the brake-shoe enough to bind
328 the wheel if the brake-shoe were set far enough from the wheel to allow the car to turn curves without binding.

XVIII.

On April 7, 1888, the whole line was ready for operation and the cars were then, for the first time, all put in use, and on the 11th defendant wrote plaintiff the following letter:

"KANSAS CITY, MO., *April* 11, 1888.

George F. Brown, Esq., gen'l m'g'r Pullman Palace Car Co., Chicago, Ill.

DEAR SIR: I have delayed answering your letter of April 5th for some days, as I wished to see your cars in practical operation before making a reply.

The Twelfth-street cable line has been running since Saturday, and we should now be operating with a full equipment if we had not been obliged to make constant repairs and changes to the car brakes.

These are very unsatisfactory, and we have hardly been able to make a round trip with a car without stopping to make repairs, and on several occasions have been obliged to run over a considerable portion of the line with no power to set the brakes.

I will make no attempt to go into this matter in detail, but wish to say that I shall insist on these cars being made right in this respect before I shall be willing to approve your bills.

If you will send a practical man here to take charge of these necessary changes it will be the best plan; otherwise we shall be obliged to make them and charge you with the expense.

There are some other things about the cars which are not as they should be, but which do not interfere with the operation of them. Many of the panels are badly cracked and the painting on part of the cars at least is very poorly done. The attention of your
329 engineer was called to these points and he admitted that the work was not done as it should be.

I have no desire to delay the settlement of your bills, and would gladly approve your vouchers for them today if we could use the cars, as it is costing the company a very large amount of money every day that we cannot operate with a full equipment. Let me hear from you in regard to what action you will take as to the brake repairs at your earliest convenience, and oblige,

Yours truly, C. F. MORSE, *President.*"

XIX.

For a few days before and after April 11th a workman sent by plaintiff was in Kansas City, at defendant's car-house, making some slight changes in the brakes at the suggestion of defendant.

XX.

Defendant continued to use the cars in the regular operation of its road, deriving revenue therefrom, for one month or until May 10th, when it discontinued the use of the cars and notified plaintiff that the cars were subject to its order. Plaintiff refused to receive the cars back, demanded the contract price for them, and also demanded pay for certain extras.

XXI.

The cars were made upon specifications upon which defendant's officers had the right to finally pass, and they exercised that right. Plaintiff knew nothing whatsoever about the road, its curves or grades, and was not skilled in the operation of such a road. Defendant knew all about the road, its curves and grades, and
330 its officers and engineers were skilled in the operation and construction of such roads. Defendant did not in any way rely upon plaintiff to make cars proper and fit to be operated upon its road, but depended entirely upon the specifications.

XXII.

There was no representation by plaintiff that the cars would be fit for operation upon defendant's line of road or that the brakes put upon it would be equal to controlling such heavy cars upon such steep grades.

XXIII.

No breach of the contract is insisted upon by the defendant, and no fault is found with the cars, and no departure from the specifications in the building of the same is alleged, except that it claims that the brakes would not properly work upon its steep grades and sharp curves, and that there was an implied warranty in the contract on the part of plaintiff that the cars would work satisfactorily on defendant's line of road.

XXIV.

Defendant's superintendent, at the time of ordering the cars, insisted that under the specifications the cars would be heavy and unmanageable, and that they ought to be made much lighter and

smaller, but its president and engineer insisted on having them made in the way in which they were built. When the defendant took the combination cars off its road on May 10 it put in their places certain other cars which it had ordered, much smaller, narrower, and lighter.

XXV.

331 During the month in which the combination cars were operated it appeared that they were too heavy to be properly managed upon the grades on defendant's road; that they were so wide that they came dangerously close when passing each other; that one or two accidents had occurred therefrom, and that one of the parties so injured had been paid by defendant for his injuries. The cars were ordered and made too large and heavy for operation upon such a line of road as defendant's. They were, however, in these respects in exact conformity with the contract and specifications under which they were built. The defendant removed them from its road because it found them too heavy and large to be properly managed, and substituted in their place lighter cars, more easily managed.

XXVI.

Defendant waived any right of *de*-cis-ion by using the cars for one month until it could obtain the other lighter cars. The defect about brakes, if there was any, could have been ascertained upon a proper inspection. It certainly did not require a month to find it out. The reason, however, that the cars proved unmanageable was on account of the heavy grades on defendant's road, of which the plaintiff was ignorant at the time of making the contract for the building of the cars and of which defendant was well aware.

XXVII.

Defendant does not claim any recompense or damages on account of defects in the cars, but claims the right of re-cis-ion and of returning the cars. By its letter of April 11, 1888, it elected, not to rescind, but to keep the cars and have alterations made or defects cured, either by the plaintiff or by itself.

332 XXVIII.

The plaintiff never in any way waived the provision of the contract concerning inspection and acceptance of the cars at its works. Its action in sending inspection certificates and receipts to defendant for signature was only done to keep its records in proper shape.

XXIX.

The contract which fixed the price of the cars at two thousand dollars called for seats arranged lengthwise in the car. The subsequent specifications of July 16th called for cross-seats, which were put in the cars at an additional expense of $83,162.50. This amount is, therefore, allowed plaintiff in addition to the contract price. It

is not shown that there was any agreement between the parties that defendant could have cross-seats put in without paying for additional expense.

XXX.

There were other changes and additions made to the cars by defendant's order, which are not disputed by defendant, and the amount due plaintiff in this action is as follows:

25 cars, contract price	$50,000 00
Extra cost of cross-seats	3,162 50
Extra gongs supplied	196 02
Extra sand-boxes applied	764 97
Renumbering cars	39 75
Advance freight	62 50
Six small wheels	3 96
	$54,219 70

To this must be added interest at 6 per cent. since March 14, 1888.

333 XXXI.

Defendant attempted to repair the brakes and thus waived its right of rescission.

See Morse's letter, Exhibit 88.

" Lawless' evidence, page 97.

XXXII.

Defendant never returned or offered to return the fares which it collected.

See Morse's evidence, page 66.

XXXIII.

Defendant never returned or offered to return the cars to Pullman Junction or Kensington, the place where they were delivered.

See Morse's letter, Exhibit 96.

XXXIV.

There is no evidence that plaintiff ever assented to a modification of the original contract as to inspection and acceptance of the cars at its works.

XXXV.

There is no evidence of any consideration passing between the plaintiff and defendant for the alleged modification of the original contract as to inspection and acceptance of the cars at its works.

1. If the court, sitting as a jury, find from the evidence that on the 14th day of June, 1887, the plaintiff submitted a proposition to the defendant to build for the defendant twenty-five combination

closed and open cable cars as per general specifications attached thereto and made a part thereof and to deliver the same
334 f. o. b. at Pullman Junction or Kensington, Illinois, for the sum of two thousand dollars each, cash on delivery, and that said cars were to be inspected and accepted at the plaintiff's works; that defendant thereafter accepted said proposition, and when a portion of said cars were ready for inspection defendant, at plaintiff's request, sent its inspector to examine the same; that he accordingly did examine the same, and, after pointing out certain defects, which were remedied, instructed plaintiff to make all the cars the same as the one that he had examined, and that it would not be necessary for him to return and inspect the remainder and to ship the cars as soon as completed, and that plaintiff thereafter did build all the cars in the same manner as the one which defendant's inspector had inspected and delivered the same to defendant at Pullman Junction or Kensington, to be shipped over a line of railroad designated by defendant, and that the purchase price thereof has not been paid, then plaintiff is entitled to recover the purchase price of $50,000, with interest.

2. The court declares the law to be that under the contract between the plaintiff and the defendant the inspection provided for covered the brakes as well as every other part of the car.

3. The court declares the law to be that under the contract between the plaintiff and defendant the inspection provided for covered all defects, latent as well as patent.

4. The court declares the law to be that, the contract between plaintiff and defendant being express that the cars should be inspected and accepted at the plaintiff's works, the law will not imply an agreement on the part of the plaintiff that the cars should
335 be suitable for running upon defendant's Twelfth-street cable line.

5. The court declares the law to be that, under the contract between the plaintiff and the defendant, the title to the cars vested in the defendant after the same were inspected and ordered shipped by defendant and plaintiff had delivered said cars free on board at Pullman Junction or Kensington, Illinois, and that defendant thereupon became indebted to the plaintiff for the purchase price thereof as provided by said contract.

6. The court declares the law to be that, under the contract between the plaintiff and the defendant, the defendant had no right to make the actual test of the cars upon its Twelfth-street line before accepting the same as complying with the contract.

7. If the court, sitting as a jury, find from the evidence that the average date of delivery of the twenty-five cable cars built by the plaintiff for the defendant and the presentation of the bills therefor was March 14th, 1888, then the court will allow plaintiff interest on the amounts found in its favor, at the rate of six per cent. per annum, from said March 14th, 1888.

8. If the court, sitting as a jury, find from the evidence that the specifications attached to the contract between the plaintiff and defendant provided that the seats in the twenty-five cars should be

the same as in the sixteen-foot cars recently built by the plaintiff for the defendant; that in said last-named cars the seats were longitudinal, and that thereafter the said seats in said twenty-five cars were changed from longitudinal to cross seats by request of the defendant, and that the substitution of cross-seats for longitudinal increased the actual cost of the cars, and that the reasonable
336 value of making such change upon the twenty-five cars was $3,162.50, and that the same has not been paid, then plaintiff is entitled to recover said sum of $3,162.50, with interest.

9. If the court, sitting as a jury, find from the evidence that in addition to the building of said cars in accordance with the contract and specifications between the plaintiff and defendant that plaintiff at the request of the defendant furnished upon each one of said cars a gong; that said gongs were not included in said specifications, and that the reasonable value of said gongs upon said twenty-five cars was $196.02, then the court will find for the plaintiff for said sum, with interest.

10. If the court, sitting as a jury, find from the evidence that the plaintiff at defendant's request furnished and supplied to each of said twenty-five cars two extra reliable sand-boxes, including freight on said sand-boxes from Boston; that said sand-boxes were not covered by the original contract and specifications, and that the reasonable value of said sand-boxes upon said twenty-five cars, including said freight, was $754.97, and that the same has not been paid, then plaintiff is entitled to recover said sum of $754.97, with interest.

11. If the court, sitting as a jury, find from the evidence that after the twenty-five cars built by plaintiff for the defendant had been numbered in accordance with the contract and specifications between them; that the numbers of eleven of said cars were changed by direction of the defendant, and that the reasonable value of making such change was $39.75, and that the same has not been paid, then the court will find for the plaintiff and against the defendant for said sum, with interest.

337 12. If the court, sitting as a jury, find from the evidence that the said twenty-five cars were to be delivered to defendant free on board the cars at its works at Pullman, Illinois, and defendant requested plaintiff to ship the same by the Chicago and Alton railway; that in order to ship said twenty-five cars by said railway it was necessary for plaintiff to advance thereon the sum of $2.50 per car for having the railway cars on which said twenty-five cars were loaded transferred to the Chicago and Alton railway; that said switching charges, amounting in all to the sum of $62.50, were paid by the plaintiff at the request of and on behalf of defendant, and that the same have not been repaid, then the court will find for the plaintiff and against the defendant in the sum of $62.50, with interest.

13. If the court, sitting as a jury, find from the evidence that on or about March 14th, 1888, plaintiff shipped to defendant at Kansas City, at its request, six small metal wheels; that the same were reasonably worth the sum of $3.96, and that the same have not

been paid for, then the court will find for the plaintiff and against the defendant for said sum of $3396, with interest from said March 14th, 1888.

14. The court declares the law to be that there is no evidence that plaintiff ever assented that the place for the final inspection and acceptance of the cars should be changed from its works to Kansas City.

15. The court declares the law to be that there is no evidence of any consideration paid by the defendant to the plaintiff in order to secure the agreement to change the place of final inspec-
338 tion and acceptance from the plaintiff's works to Kansas City.

16. If the court find from the evidence that after the cars had been inspected by the defendant's superintendent and had been delivered f. o. b. at Pullman Junction or Kensington, in accordance with defendant's order, and over a line of railroad of its own selection, the defendant received the cars at Kansas City and put the same into service upon its Twelfth-street line for the carriage of passengers for hire in the transaction of its business, then the defendant is not entitled, in any event, to rescind the contract with the plaintiff and must pay the purchase price as therein stipulated.

17. The court declares the law to be that if it appears from the evidence that defendant collected fares from the passengers while using said cars upon its Twelfth-street line, and has retained the same and has never returned or offered to return said fares, then defendant is not in any event entitled to rescind the contract between itself and the plaintiff and must pay the purchase price of said cars as therein specified.

18. If the court finds from the evidence that the defendant has never returned or offered to return said cars to Pullman Junction or Kensington, the place where they were delivered by the plaintiff to the defendant, as provided by the contract between them, then defendant is not entitled to rescind the contract between itself and the plaintiff and must pay the purchase price of the cars as therein stipulated.

339 And the court prepared findings of fact and declarations of law, and filed the same in this cause under date of October 13, 1890, and thereupon the plaintiff within due time filed and presented to the court on November first, 1890, certain exceptions to the findings of fact and declarations of law made by the court, and suggestions of additions thereto and changes and insertions therein, which were in words and figures as follows:

Now comes the plaintiff and objects and excepts to the said findings of fact for the reason that there is no evidence to support the same, and said plaintiff requests the following modifications thereof and additions thereto and insertions therein for the reason that said modifications and additions and insertions are material to the determination of the cause and because the facts stated in said modifications, additions, and insertions are conclusively proved by uncontradicted evidence.

First. Between the fourth and fifth findings the plaintiff asks that the following be inserted:

"Defendant had a firm of civil engineers in charge of the construction of the road. They were engineers of good standing; had had much experience in building cable street railway, and one of them was devoting most of his time to the personal supervision of defendant's line of road then in process of construction. These engineers had carefully examined the road and ascertained the grades and curves therein and had made profile maps of it and were thoroughly familiar with every part of it."

Second. The seventh finding contains the following:

"While in Kansas City said Pullman was on the ground, and, whilst not going over in detail the line of the track, had a
340 general knowledge of the grades and curves thereof."

Plaintiff specifically objects and excepts to that part of said finding, because the same is not supported by the evidence.

The evidence conclusively shows that said Pullman did not go over the line of the track at all, and the same is uncontradicted.

Plaintiff asks that said finding be modified by striking out the words "in detail."

Third. The ninth finding contains the following:

"Between the first and sixteenth of July, 1887, plaintiff's engineer, Mr. Twyman, visited Kansas City, stating that the general purpose of his visit was to decide upon the general features of the cars, to determine what was the shortest curve and other physical features of the road, and the radius of the shortest curve it would have to go round relative to the position of the brakes and the height of the wheels, etc., and while here had access to the plans and profiles of the road."

Plaintiff specially objects and excepts to that part of said finding because there is no evidence to support it.

The evidence conclusively shows that nothing was said by Mr. Twyman about the general purpose of his visit being to determine, among other things, "the radius of the shortest curve it would have to go round relative to the position of the brakes," and the same is uncontradicted.

Plaintiff asks the court to modify the said part of said finding to conform to the uncontradicted evidence so that the same shall read as follows:

"Between the thirteenth and sixteenth of July, 1887, plaintiff's engineer, Mr. Twyman, visited Kansas City, stating that the general purpose of his visit was to decide upon the general
341 features of the cars, to determine what was the shortest curve and other physical conditions of the road, the radius of the shortest curve it would have to go round, to arrange with reference to the outside width and the extreme length over all, the relative position of the two trucks, the height of the steps and seats, the distance between the seats, the height of the window sill, and while here he was in the room where the profiles were, but did not examine the same."

Fourth. Plaintiff objects and excepts to the tenth finding because

there is no evidence to support it and asks that the same be so modified as to show that at one time defendant's engineer while at plaintiff's works examined a plan of the brake-lever submitted by plaintiff's engineer and expressed the opinion that it was not powerful enough.

Fifth. Between the tenth and eleventh findings plaintiff asks that the following be inserted:

"The cars were made upon specifications upon which defendant's officers had the right to finally pass, and they exercised that right."

"The original width of the cars was increased by defendant's request, and when completed the cars weighed twelve thousand five hundred pounds."

"At the time of ordering the cars Lawless, defendant's superintendent, who was a man of large experience in cable lines, preferred the cable train, consisting of a separate grip car and coach, but Morse, its president, and Knight, its engineer, determined to have the combination car, being the grip and coach combined in one car, and their wishes prevailed.

"When the defendant took plaintiff's combination cars off of its road it ordered a lighter and narrower equipment, consisting
342 of grip car and coach separate, and when the new equipment was received the use of other combination cars which it had in service at the same time that it used plaintiff's cars and the brakes upon which worked satisfactorily was discontinued."

Plaintiff also asks that the following be inserted between the tenth and eleventh findings:

"During the time the combination cars were operated it appeared that they were too heavy to be properly managed upon the grades on defendant's road; that they were so wide that they came dangerously close when passing each other; that at least one accident had occurred by reason thereof, and that defendant removed them because it found them too large and heavy for practical operation and substituted in their place lighter cars more easily managed."

Sixth. Plaintiff objects and excepts to the eleventh finding because there is no evidence to support it and asks that the same be so modified that the first sentence thereof shall read as follows:

"In December, 1887, in response to plaintiff's request that defendant send one of its employees to Pullman to inspect the cars, E. J. Lawless, defendant's superintendent, a man of large experience in cable-car management in San Francisco and elsewhere, who had made that business a pursuit and study, went there for that purpose."

Plaintiff also asks that the third sentence of said eleventh finding be so modified as to read as follows:

"Said Lawless made a thorough examination of said cars, inside and out, had the brake-lever bent, and examined the brakes by having them worked from within and observing their operation and application while under and at the side of the car and
343 announced himself as satisfied therewith and requested the representative present of the plaintiff to finish the others up

in the same way and forward them without any further inspection on his part."

Seventh. Plaintiff asks that the thirteenth finding be expunged for the reason that the same contains statements of fact which are not material to any issue involved in the case and because no point is made thereon in the pleadings.

Eighth. If said thirteenth finding is not stricken out plaintiff objects and excepts to the same as incomplete and misleading and not supported by the evidence, and asks that the following addition be made thereto:

"The alterations requested were made and the difficulty remedied before defendant's line was opened."

Ninth. The fifteenth finding contains the following:

"And on the 10th day of April, 1888, defendant's whole line was ready to be opened, when the cars for the first time were placed on the line."

Plaintiff objects to that part of said finding because there is no evidence to support it, and asks that this be changed and modified so as to read as follows:

"On the 7th day of April, 1888, defendant's whole line was opened for business and the cars were then for the first time put into service, passengers being carried and fares collected."

Plaintiff also asks that this finding be so changed as to show that only twenty-two of the cars were repaired by Overtoom.

Tenth. Plaintiff specifically objects and excepts to the sixteenth finding because there is no evidence to support the same, and asks that said finding be expunged.

344 Eleventh. Plaintiff objects and excepts to the seventeenth finding because there is no evidence to support it, and asks that the same be so changed as to read as follows:

"17th. Defendant designated the line of railroad over which the cars should be shipped. Plaintiff shipped the cars over said line, delivering the same f. o. b. at Pullman Junction. Defendant paid the freight on the cars from Pullman Junction to Kansas City, amounting to $783."

Twelfth. Plaintiff objects and excepts to the eighteenth finding because there is no evidence to support it, and asks that the same be so changed and modified as to read as follows:

"After the sending of the letter of May 12th, 1888, by defendant's president to the plaintiff, notifying plaintiff that the cars were rejected and subject to plaintiff's order, the defendant built a carhouse in Wyandotte, Kansas, and stored the cars therein, but in April, 1889, just before the trial of this cause, defendant, without plaintiff's permission, took one of these cars out of said storehouse and moved it to its power-house in Kansas City, Missouri, and had the same examined by experts, and said car was in defendant's possession at its said power-house at the time of the trial."

Thirteenth. Plaintiff objects and excepts to the nineteenth finding as made because the same is incomplete and misleading, and asks that the following addition be made thereto:

"Said brake on the Laclede cars worked satisfactorily. After

plaintiff's cars were rejected, however, and a lighter equipment of grip-car and coach separate were ordered and received by defendant, it discontinued the use of the Laclede cars. There were five of said Laclede cars and they cost two thousand dollars apiece."

345 Fourteenth. Plaintiff specially objects and excepts to the twentieth finding because there is no evidence to support it; because, under the material facts which were conclusively proved by uncontradicted evidence, the question of reasonable time is a question of law, and because the uncontradicted evidence conclusively shows that the defendant used and operated the cars in question in the transaction of its business of carrying passengers for hire and not for the purpose of a test to ascertain whether they could be successfully operated with the brake furnished therewith.

Plaintiff asks that said finding be stricken out and expunged.

Fifteenth. Plaintiff prays the court to make and add the following findings of fact because the same are material to the determination of the cause and because said facts are conclusively proved by the uncontradicted evidence:

"21. The defect in the brakes was not known to the plaintiff at the time the cars were shipped, and plaintiff had no better means of discovering the same at its works than the defendant.

"22. During the time that plaintiff's cars were in use by defendant three of them were broken in places other than the brakes.

"23. When defendant discontinued the use of plaintiff's cars they had ceased to be new cars and had become second-hand.

"24. During the whole time that defendant used plaintiff's cars from the time the line was opened on April 7th, 1888, until the 10th day of May, 1888, they were used in defendant's service in the regular daily transaction of its business; passengers were received and carried, fares were collected from the passengers by defendant for their transportation, and these fares were retained by defendant, and defendant never returned or offered to return said fares to the plaintiff.

346 "25. Defendant never returned or offered to return the cars to plaintiff at Pullman Junction, Illinois, the place where they were delivered by plaintiff to defendant free on board the cars."

Sixteenth. Plaintiff prays the court to so change and modify its declarations of law wherein it is stated "that the defendant is entitled to recover from the said plaintiff the freight on said cars from Chicago to Kansas City, amounting to the sum of two thousand and nine hundred and forty-two dollars, for which judgment will be entered," so that the same shall read, "the freight on said cars from Pullman Junction to Kansas City, amounting to the sum of seven hundred and eighty-three dollars."

Seventeenth. Plaintiff prays the court to so change and modify the following statement of plaintiff's exceptions: "To which declarations of law upon the facts found as aforesaid, and to each and every one of them separately, the plaintiff, by its attorneys, at the time excepted," so that the same shall read, "to which findings of

facts, and each and every one of them separately, and to which declarations of law upon the facts found as aforesaid, and to each and every one of said declarations separately, the plaintiff, by its attorneys, at the time excepted."

Eighteenth. Plaintiff prays the court to change the following statement of its request for declarations of law:

"And the plaintiff asked the court to declare the law upon the finding of facts aforesaid to be with the plaintiff, and that the plaintiff was by law, upon the facts found, entitled to recover from the defendant the contract price for said cars, with interest, which declaration of law the court refused to make; to which ruling of the court the plaintiff, by its attorneys, at the time excepted," so that the same shall show that the specific declarations of law
347 which plaintiff requested were refused by the court and exceptions saved by the plaintiff to the refusal of said instructions and each of them separately.

And upon the hearing of plaintiff's exceptions last shown the court added findings numbered 21 and 22 to the findings of fact first prepared by it, and the same as so changed were filed by the court on January 5th, 1891, and are as follows:

348 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

PULLMAN'S PALACE CAR COMPANY
against
THE METROPOLITAN STREET RAILWAY COMPANY.

Be it remembered that when this case came on for trial the parties waived a jury and by agreement in writing filed with the clerk agreed to try the issues of the case before the court; whereupon the court proceeded to hear the evidence, and after due consideration thereof makes and declares the following special findings of facts thereon:

1st. The plaintiff for a long time prior to the transactions now in controversy was and has ever since been a corporation extensively engaged, among other things, in the manufacture and construction of cars, including cars for street cable railways, at Pullman, Illinois.

2nd. The defendant for a long time prior to the matters in controversy was and ever since has been a corporation, organized under the laws of the State of Missouri, engaged in the operation of street railway lines, including what *is* known as cable lines, in Kansas City, Missouri, and Kansas City, Kansas.

3rd. Prior to May 13th, 1887, defendant, preparatory to the operation thereof, was engaged in the construction of a double-track railway in Kansas City, Missouri, extending from the eastern city limits a long distance along Twelfth street to Bell street, at the western limits of the city, and upon said Bell street to the stock yards; thence back on Genesee street to Twelfth and on to the eastern city limits.

4th. The maximum grade of this line is thirteen and four-
349 teen per cent.—that is, thirteen and fourteen feet ascent in a distance of 100 feet. This grade was five hundred to six hundred feet long. On this line there were a number of grades running up to ten per cent. There were also on the line a number of sharp curves. This line was known as defendant's Twelfth-street line.

5th. On May 15th, 1887, the road-bed being constructed and track laid, defendant's chief engineer wrote the following letter to the agent of complainant, to wit:

"KANSAS CITY, MO., *May 13th*, 1887.

Mr. Chas. Pullman, Pullman Palace Car Co., Pullman, Ill.

DEAR SIR: We write to say that we are now ready to talk cars for our Wyandotte and 12th-street lines, and should be glad to have you call on us at your convenience.

Yours truly, KNIGHT & BONTECOU,
Chief Engineers."

6th. Pursuant to this letter Mr. Chas. Pullman, the general agent of plaintiff, came to Kansas City in person for the purpose of discussing the subject-matter of the proposed contract and preliminaries connected therewith.

7th. While in Kansas City said Pullman was on the ground, and, whilst not going over the line of the track, had a general knowledge of the grades and curves thereof. Thereafter he returned to the city of Chicago, from which place plaintiff sent a letter to the defendant in the following words:

350 "CHICAGO, *June 21st*, 1887.

Chas. F. Morse, Esq., president Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: I beg to enclose herewith contract, with specifications attached, executed by me in duplicate, for the building of twenty-five (25) combination closed and open street cars for your Co. Kindly sign and return to me one copy of contract for our files.

You will notice in the specifications that the space for the lettering has been left blank, and I would be glad if you*r* would indicate on the specifications returned the lettering you desire applied to the cars.

Very respectfully, GEO. W. BROWN,
General Manager.

2 enclosures."

The contract and specifications contained in the foregoing letter are in the words and figures following:

"*Agreement.*

CHICAGO, ILLS., *June 14th*, 1887.

Metropolitan Street Railway Co., Kansas City, Mo.

GENTLEMEN: Pullman's Palace Car Company will build for the Metropolitan Street Railway Company twenty-five (25) combination closed and open cable cars, as per general specifications hereto attached and made a part of this agreement, and deliver the same f. o. b. Pullman Junction of Kensington, Ills., on or before October 10th, 1887, delays by fires, strikes, and unavoidable hindrances excepted, for the sum of two thousand ($2,000.00) dollars
351 each.

Terms, cash on deliveries.

Cars to be inspected and accepted at our works.

Your written acceptance hereof will constitute a contract mutually binding upon both companies.

(Executed in duplicate.)

PULLMAN'S PALACE CAR COMPANY,
By GEO. F. BROWN, *General Manager.*

Accepted June 27, '87.

METROPOLITAN STREET RAILWAY COMPANY,
By KNIGHT & BONTECOU, *Chief Engineers.*

Pullman's Palace Car Company, Pullman car works.

PULLMAN, ILL., *June* 14, 1887.

General Specifications

For twenty-five (25) combination cars, lot —, plan 510, for account of Metropolitan Street R'y Co.

Ground plan.....	Length, 34′ 9″ over all; width, 6′ 6″ or more over sills.
Framing.....	Height from top of sill to under plate, —.
Flooring.....	Pullman st'd.
Style of outside.....	Number of windows each side, 8.
Roof.....	" " " end, 2.
Hood.....	

Window sash, cherry.

Glass, D. T. French. Size—lower, —; upper, —.

352 Glass in clear story, embossed. Size, —.

" in doors, D. T. French. Size—lower, —; upper, —.

Blinds, cherry frames, basswood slats.

Ceiling, mahogany; decoration, —.

Inside finish, same as 16′ cars recently built.

Seat ends, —; seating capacity, —.

Seats and backs, same as 16′ cars recently built.

Seat and back springs.

" " covering, Wilton plush carpet.

Trimmings, bronze.
Lamps, center: 2 in closed & 1 in open part.
" bracket, none.
Water cooler, "
Heater, "
Saloons, "
Locks, "
Body colors, same as 16′ cars recently built.
Decoration, suitable design.
Lettering, —.
Numbers, from 200 to 224, inclusive.
Names, none.
Platforms, 3′ 9″, per sketch, with one gate on left-hand side.
Height from top of rail to centre of drawbar, —.
Colors, same as 16′ cars recently built.
Drawer springs, —; buffer springs, —.
Brakes to be operated by gripman with lever, both trucks.
Brake-power, —.
Sand-boxes to be applied on front truck at centre.
353 Trucks, Pullman st'd for cable cars.
Gauge, 1′ 8½″.
Wheel base of truck—rear truck, 1′ 0″; front truck, short as possible to admit grip.
Colors, —.
Wheels, Fulton foundry.
Axles, 3½″ iron.
Springs, bolster, —; pilot on front truck.
" equalizer, Vose.
Pedestals, Bemis; wire guards on side.
Oil-boxes, "
Oil-box lids, "
Brake-shoes, Congdon flange.
Journal bearings, Bemis.

REMARKS.—Extra brakes on rear truck operated by brake-mast, with wheel at rear-end platform.

8th. The defendant executed said contract, as shown in the copy, and returned one copy of the same, with a letter as follows:

" KANSAS CITY, MO., *June 27th*, 1887.

The Pullman Palace Car Co., G. F. Brown, gen'l man'g'r, Chicago, Ills.

DEAR SIR: Your letter of the 21st, enclosing contracts and specifications in duplicate for the 25 combination cars for our 12th-street line, addressed to our President Morse, has been referred to us for attention in his absence, and we enclose you with this one copy, duly executed by us on behalf of the company.

Will you kindly advise about when we may expect to get the

354 general plans which Mr. Pullman, when here, promised to let us have?

Yours truly,

(S'g'd) KNIGHT & BONTECOU,
Chief Eng'rs."

9th. Between the first and sixteenth of July, 1887, the plaintiff's engineer, Mr. Twyman, visited Kansas City, stating that the general purpose of his visit was to determine upon the general features of the cars, to determine what was the shortest curve and other physical conditions of the road, to determine the radius of the shortest curve it would have to go round, and to arrange with reference to the outside width and the extra length over all, the relative position of the trucks, the height of the wheels, the steps, and the seats, and the distance between the seats, &c. He was at the office of defendant's engineer for some time and had access to the plans and profiles of the road, and while in Kansas City the following specifications were submitted by defendant's engineer:

"*Specification.*

KANSAS CITY, MO., *July 16th*, 1887.

Combination cars for Metropolitan Street Railway Co.
Length to be 38 feet over all.
Width, 8 ft. 3 in. over all.
Width of floor frame, 7 ft. 3 in.
Height from top of track to top of floor, 2 ft. 3½ in.
Distance between centres of trucks, 20 feet 0 inches.
Wheel base of truck, 4 feet 8 inches.
Distance from front of car to centre of forward truck, 4 ft. 9 in.
Length of closed part of car, 20 ft. inside.
Length of open portion, 8 ft. 9 in.
Rear platform, 3 ft. 7 in.
355 Size of wheels, 22 in. diameter.
16 cross-seats, to be fixed as decided.
Approved July 16th, 1887.
(S'g'd) KNIGHT & BONTECOU, *Engineers.*"

10th. Thereafter the plaintiff proceeded with the construction of the cars. The defendant gave no direction in relation to the brakes on the cars otherwise than that they should be extra heavy and extra powerful; nor were any plans or specifications of brakes furnished to the defendant during their construction. The brake put upon these cars was designed and constructed by Mr. Twyman, plaintiff's engineer.

11th. In December, 1887, in response to plaintiff's request that defendant send one of its employees to Pullman to inspect the cars, E. J. Lawless, defendant's superintendent, went there for that purpose. Ten or twelve cars were then shown as completed and standing in the shops of plaintiff, on the floor where they were run out. Said Lawless made a thorough examination of said cars, in-

side and out, and examined the brakes by having them worked from within and observing their operation and application while under and at the side of the car, and announced himself as satisfied therewith, and requested the representative present of the plaintiff to finish the others up in the same way and forward them without more —. No further request was made by said Lawless for testing said cars, and no other facilities were offered by the plaintiff for making such test and examination.

12th. The first five cars were shipped by plaintiff February 24, 1888. The next shipment of eight cars was on March 1st, 1888. The next shipment was of two cars, March 17, 1888. Five
356 cars were shipped March 27th, 1888, and the remainder on the 30th day of March, 1888.

13th. The cars, when they reached Kansas City, were stored in defendant's power-house, as the eastern extension of defendant's railroad was not then in readiness for operation. These cars were taken into the house by passing over a curved track from the street. This curve was 30-ft. radius. When the first lot of cars were being passed around this curve it was found that the wheels bound against the sills. Thereupon defendant's engineer telegraphed plaintiff as follows: "Forward truck of cars will not pass around 30-foot-radius curve. Lengthen stay-chains and cut away lower corner of middle sills." To which plaintiff answered: "Telegram received. Will make alterations requested."

14th. On the 22nd of March, 1888, before all the cars had been shipped, the east end of the 12th-St. line was completed so a car could run over that part of the line. Defendant's superintendent took out one of the cars for trial, when difficulty about the brakes of the cars manifested itself, which difficulty was this: When the brakes were so adjusted that they could be used to stop the car on a straight, level track, in passing around a curve or up a grade, they would bind against the wheels, causing them to slip, and at times throwing the car from the track. If the brakes were so adjusted that they would not bind on the curves or grades, then they would not work on a straight, level track so as to stop the cars. On the 23rd day of March, 1888, defendant sent plaintiff the following letter:

"KANSAS CITY, MO., 23 *Mch*, 1888.

Geo. F. Brown, Esq., gen. m'g'r.

DEAR SIR: We tried one of your cars over the line yester-
357 day and found that the brakes would not work satisfactorily; in fact, were perfectly useless. I think the reasons for this are: There being so many connections, and consequently so much lost motion, that before the shoes hug the wheels the brake-lever comes to the limit of the quadrant.

Before starting out with the car we adjusted the brakes so that the shoes touched the wheels, but notwithstanding this we could not lock the wheels or even hold the cars on the lightest grades.

As a perfect working brake is an imperative matter with us, I

would like to hear from you on the subject, and what remedy you propose.

Yours truly, EDW. J. LAWLESS."

In response to this letter Mr. Twyman, plaintiff's engineer, came at once to Kansas City and attempted to remedy the trouble with the brake, and on leaving claimed that he had done so.

15th. On April 5, 1888, the plaintiff sent the following letter to defendant:

"Pullman Palace Car Company; Geo. F. Brown, general manager.

GENERAL MANAGER'S OFFICE,
CHICAGO, *April 5th*, 1888.

C. F. Morse, Esq., president Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: The entire lot of 25 cars have been delivered, 18 of them having been shipped in February. Bills have been rendered your company for the amount of $50,000.00, being the original contract price, without extras, bills for which will be sent your auditor in a few days.

358 Will you kindly direct a prompt remittance for the bills already rendered and oblige,

Very respectfully, GEO. F. BROWN,
General Manager.

S.

Dictated."

And on or about the 7th or 10th day of April, 1888, defendant's whole line was ready to be opened when the cars for the first time were placed on the line. This was shortly after Mr. Twyman had left Kansas City. Upon the recurrence of the trouble in operating the cars defendant's president wrote plaintiff the following letter:

"KANSAS CITY, MO., *April 11th*, 1888.

George F. Brown, Esq., gen'l m'g'r Pullman Palace Car Co., Chicago, Ill.

DEAR SIR: I have delayed answering your letter of April 5th for some days, as I wished to see your cars in practical operation before making a reply.

The Twelfth-street cable line has been running since Saturday, and we should now be operating with a full equipment if we had not been obliged to make constant repairs and changes to the car brakes.

These are very unsatisfactory, and we have hardly been able to make a round trip with a car without stopping to make repairs, and on several occasions have been obliged to run over a considerable portion of the line with no power to set the brakes.

I will make no attempt to go into this matter in detail, but wish to say that I shall insist on these cars being made right in this respect before I should be willing to approve your bills.

If you will send a practical man here to take charge of these necessary changes it will be the best plan, otherwise we shall
359 be obliged to make them and charge you with the expense.

There are some other things about the cars which are not as they should be, but which do not interfere with the operation of them. Many of the panels are badly cracked and the painting on part of the cars at least is very poorly done. The attention of your engineer was called to these points and he admitted that the work was not as it should be.

I have no desire to delay the settlement of your bills, and would gladly approve vouchers for them today if we could use the cars, as it is costing the company a very large amount of money every day that we cannot operate with a full equipment. Let me hear from you in regard to what action you will take as to the brake repairs at your earliest convenience, and oblige.

Yours truly, C. F. MORSE, *President.*"

To which plaintiff sent the following letter:

"CHICAGO, *April 13th*, 1888.

C. F. Morse, Esq., president Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: Your favor of the 11th inst. received and noted. I regret to hear that you are having any further trouble with the brakes on the combination cars, as our engineer reported on his return that the trial made on the brakes on one of the cars while he was there, after some slight changes had been made, proved entirely satisfactory, and there was every reason to suppose that with these little changes the brakes would work well on the remaining cars.

I regret that your engineer or superintendent did not wire us of the situation as indicated in your letter, as we would have
360 sent our engineer over immediately. As it is he will leave for Kansas City tonight, and I trust that in conjunction with your people the defects reported can be easily remedied.

Our engineer did report on his return that the paint was acting *p*adly on a portion of the new cars and we are sending out two experienced men to attend to the paint-work on such of the cars as require it.

It is proper to explain just here that the defect seems to be with the middle panel, which is painted with what is called "crimson lake," and which is one of the most difficult colors to hold.

We regret exceedingly that there has been any trouble in this regard, and you may rest assured that the defects will be remedied without expense to your company. Speaking of the paint reminds me that our people report that the alkali water is very severe on the finish of your cars, as we know from our own experience with sleeping cars where alkali water is used.

Another suggestion in this connection I beg to make is that if your people would take the new cars ..t shop within about four or five months after they are received and give the paint a thorough

cleaning, and then two coats of varnish, they would run for at least a year without having to be varnished again, and it would also preserve the life of the paint.

Very respectfully, GEO. F. BROWN,
General Manager."

Immediately thereafter the engineer, Twyman, came to Kansas City to look after the trouble in question and did some work on the brakes while here, but, being called away by letter or telegram, he left for Chicago, stating that he would soon return and complete the work. Instead of so doing he wrote a letter, saying: "I am
361 sorry not to be able to return to Kansas City as quickly as I anticipated. We have, however, arranged to send you a man immediately who will take charge of the necessary alterations on your cars. There will be no necessity for his leaving Kansas City until everything is arranged to your satisfaction, and I will probably come out there again towards the end of the week." Immediately following this letter plaintiff's mechanic, named Overtoom, came, with typewritten instructions from Mr. Twyman, and went to work to remedy the defect in the brakes. He went over the cars one by one, and as he thus went over them pronounces them ready for service. This mechanic stated that he had done all he could do to remedy the difficulty in question, and if it did not accomplish that end he did not know how to remedy it. Notwithstanding the work and effort of this mechanic the same difficulty thereafter continued to manifest itself in the operation of the cars as to the working of the brakes. Thereupon defendant's president wrote plaintiff the following letter:

"KANSAS CITY, MO., *May 12th*, 1888.

George F. Brown, Esq., general manager Pullman's Palace Car Co., Chicago, Ill.

DEAR SIR: I have delayed corresponding with you farther in regard to the 12th-street cars, until your mechanic had finished his work. The result of this work has been very little material improvement in the action of the brakes, and the cars at no time during the progress of the repairs have been in a satisfactory condition to operate, and are not in such condition now.

This fact has been reported to the board of directors, which has today passed a resolution rejecting the 25 cars furnished by your company for 12th street on account of the imperfect brakes
362 and other seriously objectionable features, and has instructed me to notify you to this effect, and that the cars are subject to your order.

I am, yours respectfully, C. F. MORSE, *President.*"

To which plaintiff made the following answer:

"Pullman's Palace Car Company; G. F. Brown, general manager.

GENERAL MANAGER'S OFFICE,
CHICAGO, *May 17th*, 1888.

C. F. Morse, Esq., pres't Metropolitan Street R'y Co., Kansas City, Mo.

DEAR SIR: Your letter of the 12th inst. relating to the twenty-five combination cars built by this company for your company has been received and noted.

You are cognizant of the fact that the cars were built according to plans approved by your chief engineer, the material used, as well as the workmanship, being first class in all respects.

The cars before shipment were inspected and accepted by your gen'l superintendent. The cars were then shipped to, received, and put in use by you. Subsequently you made complaint that the brakes did not in all respects work satisfactorily, and a competent mechanic was promptly sent to examine the brakes and make any adjustment found necessary. When the brakes were examined and adjusted on one car your officers pronounced them satisfactory; thereupon the brakes were in like manner examined and adjusted on the remaining cars, all the cars then being in use by your company.

In view of the facts your present statement to the effect
363 that you reject the cars on account of "imperfect brakes and other seriously objectionable features" is quite astonishing and I must assume that you have been misinformed as to the condition of the cars, as I am unwilling to believe that you would knowingly allow yourself to be a party to such an unreasonable and unfounded claim.

I have to request, therefore, that you will without further delay remit the amount due this company for said cars, as per bills heretofore rendered, and thus avoid the necessity of any action on our part to enforce the payment of the amount due us.

Very respectfully, GEO. F. BROWN,
General Manager."

16th. The cars could not be operated successfully on defendant's railroad track for which they were designed with this brake nor upon similar lines, and this defect or inability in the brake was not apparent nor discoverable upon any reasonable inspection made at the place of their manufacture and could not be discovered without a practical test on the defendant's railroad track or over like track. The defect in the brake was a latent one which did not and could not develope to the observation on inspection and was only discoverable when put into use on the defendant's track or similar track.

17th. The defendant paid the freight and drayage on said cars from Chicago to Kansas City, the sum of $1,088.50, and paid for building house in which to store the rejected cars $1,850.

18th. After the sending of the letter by defendant's president to the plaintiff informing it that *that* the cars were rejected and were at plaintiff's disposal, the defendant built a car-house at or near Kansas City and stored therein these cars, where they have ever since remained.

364 19th. The defendant operated upon its said road combination cars of a similar character, weighing about six hundred pounds less than the cars in controversy, which were manufactured by the Laclede Car Company of St. Louis, Missouri, and were operated by a brake of a different pattern, costing from seventy-five to one hundred dollars apiece.

20th. The defendant did not use and operate the cars in question longer than was reasonably necessary to ascertain whether they could be successfully operated with the brake furnished therewith.

21st. During the time defendant run the cars on its road, during the tests made, as hereinbefore found, passengers were received thereon and fares collected from them by defendant. The successful running of the trains was frequently interrupted by breaking of the cable and the locking of the car wheels, in consequence of the defective construction of the brakes, and defendant so continued in the attempt to run said cars during the time of plaintiff's promises to repair the alleged defect, and on such trips received on board of said cars passengers and collected from them the customary fare. On the trial defendant offered to prove that, owing to the insufficiency of the brakes, the cars were run at loss, and that no profit resulted from collection of fares. On plaintiff's objection this testimony was by the court excluded.

22nd Defendant had in its employ during the time in question two engineers of skill and experience, one of whom, Mr. Lawless, the same person who went to Chicago to inspect the cars at plaintiff's yards, had experience in the construction and practical operation of cable cars in San Francisco, California, prior to the time of taking service from defendant.

365 To the findings of the foregoing facts and each of them and the declaration of law arising thereon the plaintiff at the time duly excepted and still excepts.

Upon the foregoing facts the court on its own motion declared the law of the case to be that the defendant had the legal right to rescind the contract for the purchase of said cars in the time and manner set out in the foregoing special findings of fact, and that the defendant rescinded said contract in accordance with its legal right so to do, and made a lawful tender of said cars to the plaintiff, and is not liable to the plaintiff for the contract price of said cars or any other sum, and that the defendant is entitled to recover from the said plaintiff the freight and drayage on said cars from Chicago to Kansas City, amounting to the sum of one thousand eighty-eight and $\frac{50}{100}$ dollars, for which judgment will be entered.

To which declarations of law upon the facts found as aforesaid and to each and every one of them separately the plaintiff, by its attorneys, at the time excepted, and the plaintiff asked the court to declare the law upon the finding of facts aforesaid to be with the

plaintiff, and that the plaintiff was in law, upon the facts found, entitled to recover from the defendant the contract price for said cars, with interest; which declaration of law the court refused to make; to which ruling of the court the plaintiff, by its attorneys, at the time excepted, and the court now here signs and seals the finding of facts and the said plaintiff's several exceptions to the rulings of the court and orders that the same be spread upon the record and made part of the record of this cause.

HENRY C. CALDWELL,
Circuit Judge.
JNO. F. PHILIPS,
District Judge.

366 And the court overruled all of said exceptions and suggestions so submitted to it by plaintiff on November first, 1890, and approved the findings of fact and declarations of law so heretofore signed by the judges and filed on January 5th, 1891, as a part of the record in this cause; and the plaintiff duly excepted to the rulings of the court in so passing upon its requests and objections in relation to said findings of fact and declarations of law.

And thereupon the court found the issues for the defendant and gave judgment in its favor; to which decision and judgment of the court plaintiff then and there duly excepted.

And thereupon the court granted to the plaintiff time in which to prepare and file its bill of exceptions herein, which time was, by orders duly entered herein, extended to the first day of April, A. D. 1891.

And forasmuch as the matters and things above set forth do not fully appear of record the plaintiff now comes and presents this its bill of exceptions and prays that the same may be signed and sealed by the court and made part of the record in this case, which is accordingly done this fourteenth day of March, A. D. 1891.

HENRY C. CALDWELL, [SEAL.]
U. S. Circuit Judge.
JNO. F. PHILIPS, [SEAL.]
U. S. District Judge.

And afterwards, at chambers, before the Honorable John F. Philips, judge of said court, and on the 2nd day of April, A. D. 1891, the following order was made in said cause, to wit:

367 PULLMAN'S PALACE CAR CO.
ag'st
METROPOLITAN STREET RAILWAY CO.

This day comes defendant, by its attorneys, and presents petition for writ of error and supersedeas and also a bond, as required by law, and, on consideration thereof, it is ordered that said bond be approved and operate as a supersedeas of the judgment herein. Thereupon said writ of error is allowed and a citation signed by the judge.

Said petition for writ of error and order of supersedeas is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

PULLMAN'S PALACE CAR COMPANY, Plaintiff,
vs.
METROPOLITAN STREET RAILWAY COMPANY, Defendant.

Now comes The Pullman's Palace Car Company, the above-named plaintiff, and presents herewith its petition for a writ of error and files herewith an assignment of errors, together with a good and sufficient bond for twenty-five hundred dollars, being more than double the amount of the judgment rendered in favor of the above-named defendant.

Wherefore plaintiff prays for the allowance of a writ of error and an order of supersedeas to stay proceedings upon said judgment until the same shall have been reviewed by the Supreme Court of the United States.

JOHN S. RUNNELLS,
WILLIAM BURRY,
GARDINER LATHROP,
Attorneys for Plaintiff.

368 Let writ of error issue with order of supersedeas.
JNO. F. PHILLIPS,
U. S. Dist. Judge.

Said bond so filed as aforesaid is in words and figures as follows, to wit:

Know all men by these presents that we, Pullman's Palace Car Company, George M. Pullman, are held and firmly bound unto the Metropolitan Street Railway Company, a corporation of the State of Missouri, in the sum of twenty-five hundred ($2,500) dollars, good and lawful money of the United States of America, to be paid to the said Metropolitan Street Railway Company or to its certain attorney, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this thirtieth day of March, in the year of our Lord one thousand eight hundred and ninety-one.

The condition of this obligation is such that if the said Pullman's Palace Car Company, as plaintiff in error, shall prosecute to effect its writ of error to the circuit court of the United States for the western division of the western district of Missouri to review and reverse a judgment in favor of the Metropolitan Street Railway Company aforesaid against said Pullman's Palace Car Company for the sum of one thousand and eighty-eight and $\frac{50}{100}$ dollars ($1,088.50), and shall answer all damages and costs if it fail to make its plea

good, and shall in such event pay the whole amount of such judgment, including just damages for delay and costs and interest on the appeal, said judgment having been rendered in the case of Pullman's Palace Car Company, plaintiff, against The Metro-
369 politan Street Railway Company, defendant, then this obligation to be void; otherwise to remain in full force and virtue.

PULLMAN'S PALACE CAR COMPANY.
GEO. M. PULLMAN, *President.* [SEAL.]
GEO. M. PULLMAN. [SEAL.]
WITTEN McDONALD. [SEAL.]
W. H. WINANTS. [SEAL.]

Attest:
[SEAL.] A. F. WEINSHEIMER, *Sec'y.*

Bond approved April 25, 1891.
JNO. F. PHILIPS,
U. S. Dist. Judge.

UNITED STATES OF AMERICA, *set:*

I, Warren Watson, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the above and foregoing is a full, true, and accurate transcript of the record and proceedings in the cause therein named as fully as the same appear of record and on file in my office.

In testimony whereof I have hereunto set my hand as clerk and affixed the seal of said court. Done at office in Kansas City, in said division and district, this 16th day of April, A. D. 1891.

(Seal of the United States Circuit Court for the Western District of Missouri, Western Division.)

WARREN WATSON, *Clerk.*

Endorsed on cover: Case No. 14,605. W. Missouri C. C. U. S. No 146. Pullman's Palace Car Company, plaintiff in error, *vs.* The Metropolitan Street Railway Company. Filed April 29, 1891.